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SUPREME COURT OF THE UNITED STATES.

No. 273.

CHARLES L. HAYWARD, APPELLANT,

vs.

THE ELIOT NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 21, 1875.

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1 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-four.

Before the honorable Nathan Clifford, associate justice.

CHARLES L. HAYWARD, COMPLAINANT, *v.* ELIOT NATIONAL BANK, DEFENDANT. } In equity.

The bill of complaint in this cause was filed in the clerk's office on the fourteenth day of March, A. D. 1872, and was duly entered at the October term of this court, A. D. 1871, and is in the words and figures following, namely:

1½ *Bill of complaint.—Filed March* 14, 1872.

To the honorable the circuit court, sitting in equity:

The bill of complaint of Charles L. Hayward, of Boston, in the commonwealth of Massachusetts, complainant, against the Eliot National Bank, a corporation duly organized under the laws of said commonwealth, having its place of business in said Boston, and by its corporate act having become a national association, entitled to the privileges and subject to all the duties and liabilities of a national bank under the provisions of the one hundred and sixth chapter of the acts of Congress for the year 1864, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and under and by virtue of said act subject to be impleaded in the federal courts of the United States within the district of Massachusetts.

And the complainant says that in the month of October, A. D. 1866, he borrowed of the respondent bank on different days two several sums of money; at one time twenty thousand dollars, and at another time sixty-five hundred dollars, and agreed to pay therefor lawful interest as long as the sums should remain a loan and until the said sums should be paid.

That to secure the ultimate payment of the said moneys the complainant caused to be issued to the respondent bank four hundred and
2 fifty shares of the capital stock of the Hecla Mining Company, a corporation organized under the laws of the State of Michigan for the purpose of conducting mining operations in the State of Michigan, and having an office for the transfer of stock and transaction of its business in said Boston

That the said shares were the property of the complainant, and were by his order and direction issued to the respondent as collateral security for the payment of the said loans.

That prior to the issue of said shares as collateral security as aforesaid the complainant had paid for the same the original subscription-price, and all assessments thereon, and they were taken by the said respondent bank free from all existing demands or claims, and were then worth in reality far more than the amount of said loans and more than the par value thereof.

That the complainant paid to the respondent bank the interest upon

said loans down to the 1st of April, 1867, and whether to a later da
is unable to say, but claims the right to make proof of any payn
thereon, or on account thereof, or on account of the said principal
which may be in his power to produce.

That he is informed and believes that said Hecla Mining Comp
in the years 1867 and 1868, laid certain assessments upon each sha
its capital stock, consisting of twenty thousand shares in all, and
manded payment of the holders thereof within a certain time spec
in the act or proceedings of said company establishing the same.

That said assessments were of the amounts and bear the dates fol
ing, that is to say:

On the 27th day of February, 1867, three dollars per share; on
1st of July, five dollars per share; on the 21st day of September,
dollars per share; on the 21st day of November, five dollars per sh
and on the 21st day of January, 1868, four dollars per share.

That he is informed and believes that the respondent bank paid
of the above assessments at different times after the same were
together with the interest that had accumulated thereon after the s
were payable, to the day of said payment, and charged the sum
paid, both principal and interest, to this complainant in his accoun
the said loan.

And the complainant further shows that said Hecla Compa
3 as originally organized, had its capital divided into twenty th
sand shares; that in the years 1869, 1870, and 1871, said c
pany declared and paid out of its own earnings cash dividends u
each share of its capital stock as follows, that is to say: In Decem
1869, five dollars; in the months of April, August, and November, 1
five dollars each month; in January and February, 1871, five dol
each month, and in April, 1871, two and one-half dollars, making in
thirty-two and one-half dollars cash dividends paid in said years by
company; that all of said dividends which were payable on accoun
the said four hundred and fifty shares owned by this complainant
assigned to the respondent bank as collateral security as aforesaid, be
thirty-two dollars and fifty cents upon each share, were paid by s
Hecla Company to and received by the respondent bank, or some pa
or parties acting under its authority.

And the complainant, upon information and belief, further shows
charges that the said Hecla company did, in May, 1871, by some
rangement made with the Calumet company—also a corporation org
ized for mining purposes under the laws of Michigan—unite its p
erty and privileges with those of said last-named company, and fo
a new corporation under the title of the "Calumet and Hecla Min
Company," having a capital of forty thousand shares, of which
holders of shares in either of said Hecla or Calumet companies were
titled to an equal number; whereby the said respondent bank, or th
then holding the said four hundred and fifty shares of the complaina
stock, under its authority, became entitled to and did take four hund
and fifty shares of the Calumet and Hecla Mining Company's stock.

And the complainant further shows, upon information and belief, t
the said last-named company, the Hecla and Calumet Mining Compa
was duly organized under the laws of the State of Michigan, and
an office for the transfer of stock and transaction of its business in s
Boston.

That said last-named company has, from time to time, since May, 18
made sundry dividends in cash and stock, by virtue of which it has

vided to its stockholders valuable portions of its earnings and property, viz:

First. On the 15th of May, 1871, said company increased its capital stock, and represented the same by creating ten thousand new
4 shares, which it divided among the holders of the said forty thousand shares of its original capital, making the same fifty thousand shares, and at the same time divided to the holders of each one of the said fifty thousand shares the sum of five dollars in cash.

Second. On the 15th of August, 1871, it created ten thousand shares of new stock, which it divided pro rata among the holders of the said fifty thousand shares of its then capital, thus making its capital sixty thousand shares, and at the same divided to the holders of each of the said sixty thousand shares five dollars in money.

Third. On the 15th day of November, 1871, it created yet another ten thousand shares of new stock, thus making its capital stock seventy thousand shares, and issued the same pro rata to the holders of the said sixty thousand shares, and at the same time it divided to the holders of each one of the said seventy thousand shares, in money, five dollars.

Fourth. On the 15th day of February, 1872, it yet again created ten thousand shares of new stock, thus making its capital eighty thousand shares, and issued the said ten thousand shares pro rata to the holders of the said seventy thousand shares, and at the same time divided to the holders of the said eighty thousand shares, in money, five dollars for each and every share.

That of the said moneys and shares so divided, paid, and issued, the said respondent bank, or parties acting under authority derived therefrom, have received all that was divided on account of the said four hundred and fifty shares of this complainant, so issued as collateral security to the said respondent bank as aforesaid. And the complainant avers and charges that the respondent bank has received and holds, either directly or through the intervention, or in the names of parties holding only through it, the respondent bank, nine hundred shares of the capital stock of the Calumet and Hecla Mining Company, the property of this complainant; that it has in like manner received large sums in money as dividends upon said four hundred and fifty shares, and upon other shares resulting from and divided to said shares, which, of right, should be applied upon the claim held by said bank against your complainant for said loan, and for any lawful claims for moneys paid as and for assessments upon said shares.

That the moneys received by said respondent bank, or those acting under authority derived therefrom, will, if justly and fairly ap-
5 plied to the respondent's demand against your complainant, nearly or quite pay and extinguish the same.

And this complainant hereby offers to pay any and all sums due from him on account of said loans, or of payments of lawful assessments upon said stock, together with the interest thereon, deducting therefrom the moneys received by the respondent bank, or those acting under authority derived from it, on account of said stock.

The complainant further shows that, on the eleventh day of March, 1872, he demanded of the respondent bank an account of its claim against him, growing out of the premises, and announced his purpose to redeem said stock or shares, and to pay whatever was justly due from him, on account of which the same was holden; which said demand was in the writing and in the words and figures following, viz:

BOSTON, *March* 11, 1872.

To the Eliot National Bank:

Will you please render an account of the amount now due upon the loans ($20,000 and $6,500) made to me by the bank in October, 1866, for which I pledged, as collateral security, four hundred and fifty shares of the capital stock of the Hecla Mining Company.

The principal of said loan, and all assessments upon said stock paid by the bank, together with all interest upon said sums now due and unpaid by the cash dividends received upon said stock, I am ready and desire to pay. It is my purpose to redeem said stock, and to pay all moneys for which it is lawfully holden.

Will you deliver said account to Mess'rs Hodges & Barrett, my counsel, or their order.

I am respectfully yours, etc.,

CHARLES L. HAYWARD.

P. S.—Mess'rs Hodges & Barrett have offices at 42 Court street, Boston.

To which demand this complainant received a response, of which the following is a copy:

6 JOHN DEMERRITT, President. R. B. CONANT, Cashier.

ELIOT NATIONAL BANK.

Capital, $1,000,000.

BOSTON, *March* 11, 1872.

I have to reply to a communication dated March 11, and signed by you, that the account referred to was rendered and settled by M'r Demerritt a long time since.

Respectfully yours,

R. B. CONANT, *Cashier.*

To CHARLES L. HAYWARD, Esq.

and has received no other.

And the complainant charges that no valid sale has been made of said shares; that if said respondent bank has pretended to sell the same, or any part thereof, or done any act or thing having a tendency to transfer the title in said shares to any other party, or has procured or permitted certificates for said shares to issue to any other parties, it has been done without notice to this complainant, without right, and in fraud of his just claims; and that the respondent bank now holds in fact, or is chargeable in law as holding, nine hundred shares of the capital stock of the said Calumet and Hecla Mining Company for this complainant, and as collateral security for the payment of any balance due from him on account of said loans and assessments and interest over and above the cash dividends paid and received as hereinbefore specifically stated.

And the complainant further shows that the respondent bank, and those acting under authority derived from it, now hold of the stock of the Calumet and Hecla Mining Company nine hundred shares, of the market value at this time of one hundred and thirty dollars per share, the property of this complainant. That the said four hundred and fifty shares of the stock of the said Hecla Mining Company was never lawfully sold by the respondent bank, and the same has always been the property of this complainant, subject only to the claims of the respondent bank against him as hereinbefore stated. That from the stock dividends made by the said Calumet and Hecla Mining Company, and the

arrangement made as aforesaid between the said Hecla and Calumet companies, the complainant, as owner of the said four hundred
7 and fifty shares of Hecla stock, became and was and is the owner of the original four hundred and fifty shares of Calumet and Hecla stock, and of the other four hundred and fifty shares issued as dividends thereon, as hereinbefore stated.

That the respondent bank refuses to render an account of the claims it holds against the complainant, and for the payment of which it holds said shares as security, and this complainant is therefore unable to know the amount claimed by the respondent bank to be due from him, and to pay or tender the same. The complainant now offers to pay any sum justly due from him to the respondent bank, on account of said loans, or on account of said moneys paid for said assessments, and all interest due thereon.

That the respondent bank, contriving to injure and defraud this complainant in the premises, refuses to render said account, and holds and refuses to surrender said shares to the complainant; all of which is contrary to equity and good conscience, and tends to the great injury of the complainant.

To the end, therefore, that said respondent bank may answer the premises, and more particularly may make full and perfect answer to the interrogatories specifically propounded and numbered as following, viz:

1. Whether or not the complainant did borrow of the respondent, in October, 1866, the sums of $25,000 and $6,500, and did pledge, as security for the payment thereof, four hundred and fifty shares of the stock of the Hecla Mining Company?

2. Whether the said Hecla Mining Company did unite with the said Calumet company, and form a new company under the name of the "Calumet and Hecla Mining Company," and whether said last-named company did issue four hundred and fifty shares of its stock for and in the place of the said four hundred and fifty shares of stock of the Hecla Mining Company; and whether the said Calumet and Hecla Mining Company have by issuing and dividing other shares, now increased the said four hundred and fifty shares to nine hundred shares?

3. Whether said Calumet and Hecla Mining Company have paid upon said stock any, and what, dividends?

And that the respondent bank may be decreed to convey to the complainant said nine hundred shares of the stock of the Calumet and
8 Hecla Mining Company, and to pay over to him whatever may be due him, upon taking an account of the moneys received on account of said stock, and for such other and further relief in the premises as may be consistent with equity and good conscience.

And may it please your honors to grant unto the complainant a writ of subpœna directed to the respondent bank, commanding it to appear at a certain day, and under a certain penalty, before this honorable court, to answer the premises and to stand to, abide and perform such order, direction and decree as to your honors shall seem meet. And the complainant will ever pray.

CHA'S L. HAYWARD.

J. M. KEITH, *Solicitor.*
E. F. HODGES, *of Counsel.*

BOSTON, *March* 19, 1872.

Sworn to before me.

JOHN L. LOWELL,
District Judge.

This cause was thence continued to the May term of this court, A. D. 1872, when the following answer was filed, namely:

Answer.—Filed May 21, 1872.

Answer of Eliot National Bank, defendant, to the bill of complaint of Charles L. Hayward, complainant.

This defendant corporation, for answer to said bill of complaint, says: That they admit that they are, and were at the time alleged in said bill, a corporation, and that the Hecla Mining Company was a corporation organized and located, as in that behalf, is set forth in said bill; that complainant did borrow of them, in the month of October, 1866, the sum of twenty-six thousand five hundred dollars, and as the owner thereof pledged to them as collateral security for said loan four hundred and fifty shares of stock, and of the capital stock of the said mining company. They say that of said amount the sum of six thousand five hundred dollars was so borrowed by the said complainant on October 17th, 1866, and one hundred shares of said stock was pledged for that loan, and that the balance of said sum, to wit, twenty thousand dollars, was loaned and borrowed on the nineteenth day of the same month, and three hundred and fifty shares then pledged for that loan, making in all
9 a loan of $26,500, and a pledge of four hundred and fifty shares of said mining stock; that transfers of said stock were made, and new certificates therefor were duly made, running absolutely in form to them in the name of R. B. Conant, their cashier. And they say that said complainant, in obtaining said loans, represented that he had bought said stock for a man on Beacon street, in Boston, who was then away from the said city, but who would return on the following day, or directly, when he would take said stock and pay for it, and the said loan would then be repaid, and said stock redeemed; and that he was himself good and pecuniarily responsible, and that his check was good for the amount, irrespective of the security.

They admit that the time of said loans, the said security was supposed to be sufficient, and that the stock was then worth about or quite as much as the amount of said loans, as it was selling in the market, and say that the loans were made as temporary loans, on what is called the demand-loan account, and upon the urgent request of said complainant, and on the strength of his said representations, and his promise that the same should be repaid directly; and with no understanding or agreement that the loans should remain unpaid for any considerable length of time, but the contrary thereof. That it is true that said complainant paid the interest on said loans up to the first day of April, 1867, and they say that $375.03 more interest was paid out of and by means of the sale of some government bonds which they held pledged by said complainant for another and a prior loan of his, which he had not paid as agreed, and where the bonds were sold by his authority and consent, and the proceeds were applied to pay the amount of said prior loan, and the surplus above that was used to pay in part the interest as aforesaid on the said other loans subsequent to said April 1, 1877.

That said complainant failed and neglected and refused to repay said loans and redeem said stock, as he had promised as aforesaid, but suffered the same, and defendants were compelled to allow the same, to remain unpaid; that instead of repaying the same the complainant withdrew his account, which he had previously kept as a customer and a depositor at the bank, and ceased keeping it there, and made thereafter no more deposits therein; that it is true that certain assessments were

laid and made by said Hecla company upon their capital stock, including the shares pledged as aforesaid, and as set forth in that behalf
10 in said bill, and that defendant paid the amount of the same, together with interest which had accrued thereon, before the time of payment.

And they say that said assessments were laid and were due and paid as follows, to wit: One assessment of three dollars a share was due April 1st, 1867, and paid August 9th, 1867, amounting to $1,350 principal and $29.03 interest; another assessment of five dollars a share, due July 15th, 1867, was paid July 23d, 1867, amounting to $2,250 principal and $3 interest, making $2,253; another assessment of five dollars a share, due September 24th, 1867, was paid October 11th, 1867, amounting to $2,250 principal, with accrued interest; that another assessment of five dollars a share, due November 21st, 1867, was paid December 26th, 1867, amounting to $2,250 principal and $13.12 as interest; and another assessment of four dollars a share, due January 21st, 1868, was paid April 24th, 1868, amounting to $1,800 principal and $27 as accrued interest. That the total amount of assessments was at the rate of twenty two dollars a share, and was in the aggregate $9,900, and the total amount of interest paid by these defendants on said assessments was $72.15, making $9,972.15.

That the complainant paid no part of said loans or assessments, and no interest on either, after said first day of April, 1867; that on September 8, 1868, the said account of complainant stood in the premises as follows, with interest reckoned at six per cent. per annum, to wit:

Amount of assessments and interest paid	$9,972 15
Interest to that date on $20,000 loan	1,723 33
" " " " 6,500 "	560 08
" " " " assessments paid	501 60
Add amount of principal sum of loans	26,500 00
Total	$39,257 16

That the account was made up as above by the defendant's clerk as of said September 8, 1868. And these defendants, further answering, say that from time to time, and at different times between the dates when said loans were made, and the said eighth day of September, 1868, they made rigorous and repeated efforts to induce said complainant to redeem said stock, and to repay said loans, the sums paid on account of said assessments and the accrued interest thereon; that he was often
11 requested to do so, and at times encouraged, that if he would pay the defendants in part or whole, they would assist him in carrying the stock, if he desired; that particularly, when said assessments were made, or during that time, he was asked to meet and pay them, but neglected and refused to do so; that they, from information and belief, aver that said complainant at the time of obtaining said loans was insolvent, or, at least, that he soon became so; that he continued to be insolvent or greatly embarrassed in his pecuniary affairs all the time until September 8, 1868, and, as they believe, ever since then; that he, at least at all times when requested to pay as aforesaid, asserted that he was without property, and had no means or credit, and was wholly unable to pay said money; that at one time he was asked to solicit his friends to aid him, but he said they would not touch it, as it was copper stock; that at other times, and repeatedly, he said defendants must make the debt out of the stock, and when he was able he would pay the balance due, and that they must look to that alone, as he had nothing

else to pay with; that said stock was depressed in the market, and so declined directly after it was pledged, as aforesaid, and continued in that condition down to September 8, 1868, and for nearly a year after that time; that its market value was greatly less than the amount due upon it, and at times, if sold in the market, it would have paid but little, if any, more than one-half said indebtedness then due these defendants, as aforesaid; that as defendants could not realize their debt out of it by sale or otherwise at any time, they continued to keep the same, and let the said debt lie, to their great annoyance and embarrassment, until September 8, 1868, when, by virtue of the express authority in writing and otherwise, they sold the same to John P. Robinson, J. H. White, and W. H. Goodwin, in equal shares, to wit, 150 shares to each for the sum of $13,085.72, amounting in the aggregate to $39,257.16, the then indebtedness of said complainant, as figured to that date, as aforesaid; that the same was sold at private sale, and the stock was duly transferred to them respectively, save that the said Goodwin bargained for his said 150 shares for himself and J. G. Weld, who bought it on joint account as between themselves, and new certificates were issued by said Hecla Mining Co., upon proper transfers, and delivered to said purchasers accordingly, said Goodwin taking his and said Weld's said
12 portion; that this sale and transfer, with the account of said complainant, cast up as aforesaid, were reported and returned to him at or about the time when they were made, and the proposition of the defendants to sell to said purchasers, and their purpose to buy in that way and on said terms, was submitted to said complainant specifically before the sale was made, and he not only assented to its being made, and requested that it might be made, but expressly and formally approved of it when done, making known his entire satisfaction with the transaction, and stating that he was glad and delighted that he had been "taken from under the harrow," as he expressed it in substance; that in making said sale, the purpose and proposition was to sell the stock at a price which would cover the said indebtedness entirely; and it was supposed at the time, according to the figures of a clerk in making up the account, that this was done; and the borrowed and received memorandums, which said complainant gave at the time for said loans, and which the defendants still held, were given to the president of the bank, John Demerritt, to be delivered to him; but it was found by him or the cashier, on an accurate or more careful computation with the agreed and legal rate of interest, that there was a balance of about sixty dollars still due; that this was stated to complainant by the president of defendant's corporation, and he agreed that it was so, and promised to pay that balance soon, or as soon as he could do so, and then would take up the memorandums and close up the matter; that he delayed doing so from alleged inability or want of means, and the matter on this account remained unadjusted, so far as the payment of said balance was concerned, but not otherwise.

The defendants further say and aver that the complainant, being unable to repay said loans and to redeem the said stock, and not able or willing to meet the said assessments, abandoned, or virtually abandoned, said stock, telling them that they must make what they got out of said stock, leaving it to him to pay the balance when he should be able; that particularly on the ninth day of November, 1867, said complainant executed and delivered an authority in writing in words and figures substantially as follows, to wit:

"BOSTON, *Nov.* 9, 1867.

"I hereby authorize the president and directors of the Eliot National Bank to sell, at their discretion, four hundred and fifty shares of
13 stock of the Hecla Mining Company, held as collateral security for loan, proceeds of sale to be applied upon said loan.

"To the president and directors of the Eliot Bank.

(Signed) "CHA'S L. HAYWARD."

The defendants say it was not thought best, at the time of giving said power in writing, to proceed and sell at once, as it would result in too great a loss; that it was thought best to wait a more favorable time, they hoping the stock or the affairs of said complainant would take a favorable turn; that in the discretion allowed defendants the loans were allowed to lie, and the stock was not sold until the time named aforesaid, the said power and authority in writing not being meanwhile revoked, but remaining in full force; that, finally, after waiting in vain for so long a time for the said stock to increase in value, they, in exercise of their discretion, concluded to sell unless said complainant would pay the loans or some part thereof, and at a meeting of the directors, a vote was passed which appears in the following record of their proceedings, to wit:

"MONDAY, *Aug.* 17, 1868.—Present, Demerritt, Robinson, Curtis, White, and Procter. That unless M'r Hayward pays five thousand dollars during the present week, and five thousand dollars the week following, upon loan, having Hecla stock as collateral, the president is instructed to sell the same."

That said action was communicated to said complainant, but he declined to comply in part or whole, saying again that he could not pay, and would do nothing about it; that thereupon the proposition to sell to said purchasers, and by them to buy, for the price and as aforesaid, was made and canvassed and determined upon, and the sale made with the full concurrence of, and with the prior assent and subsequent approval of, said Hayward, as aforesaid; and that the defendants, after said sale and transfer as aforesaid, had no interest, part, or lot in the subsquent transactions in relation to the same, the consolidation of the said Hecla Mining Co. and the Calumet Mining Co., the formation of a new corporation, the making of dividends in cash or stock, and the issuing of new stock by the said new corporation, as set forth in said bill, and whatever they were, in fact.

These defendants have no personal knowledge, but from infor-
14 mation admit generally, that the Calumet Mining Co., was a corporation organized under the laws of Michigan, and that said Hecla Company, and the said Calumet Mining Co. did, by virtue of some legislation in Michigan, make an arrangement and unite their properties, and form a new corporation, by consolidation, under the name of the "Calumet and the Hecla Mining Co.," as set forth in that behalf in said bill, and say that said union and consolidation was effected in May, 1871. But from information, they say and aver, that two other mining companies sold out, and were joined also in said consolidation, the new corporation issuing the same number of shares that the four companies combined previously had.

That prior thereto, to wit, during years 1869, 1870, and 1871, said Hecla Mining Company declared and paid certain dividends upon each share of its capital stock, and that the Calumet and Hecla Mining Company, after the said consolidation, issued new stock, and made and paid certain cash and stock dividends to the stockholders, but just what the

amounts thereof were, or the dates when made and paid, or who received and had the same, these defendants have no personal knowledge, and cannot state, only from information or belief, and, if material, leave it for complainant to prove the same. Certain it is, that no such stock was issued or dividends made and paid by either of such corporations, as set forth in said bill, until after these defendants had sold and transferred, and had no longer any interest in the same, or the subsequent transactions had in relation thereto, and that the parties who did receive and have the benefit of the same, were not acting under the authority of these defendants, as complainant charges in said bill. According to their information and belief, they suppose and believe that dividends were made and paid other than this, as set forth in said bill.

These defendants deny that at the time of filing said bill they had, or that they ever have held, since September 8, 1868, or that they do now hold, directly, or through the intervention, or in the names of parties holding through them, 900, or any number of the shares of the capital stock of the Calumet and Hecla Mining Company, the property of the complainant, or that it has or ever held any dividends belonging to him, or which they are bound to account to him for, as set forth and charged against them in said bill, and they aver the contrary thereof to be the truth.

They admit that said complainant did, on or about March 11, 1872, send a notice or demand to them, a copy of which is set forth in said bill, and that their cashier answered the same, as alleged in that behalf. But they say and aver, that, at that time, said complainant had no just claim whatever against them, and that there was no existing liability of defendants to him, but that he, on the contrary, was bound to pay the balance set forth as aforesaid, as due from, and promised to be paid by him to their president; that the demand was not made until after a fortunate turn in the affairs and market-value of the stock of said new corporation; that at the time when said sale was made on September 8, 1868, the parties who purchased paid for it some eight or ten dollars a share more than the then market-price of the stock, and the same was more than could have been obtained for it of anybody else; and this complainant well knew that the purchasers were induced to purchase said stock, and pay said price for it, not because it was then worth that sum in the market, but from certain other alleged considerations outside thereof; that the loan had lain a long time as "dead-wood," or "dead-paper," as such is called, and was a source of annoyance to the bank, and a subject of complaint generally; that the purchasers, being directors in the bank, and likewise interested as stockholders, concluded they would, rather than have the bank lose by a sale of the stock in the market at the then market-price, buy the stock themselves as individuals and in their own right, and take the chances of it in the future; that the defendants had determined not to hold the stock or let it lie any longer, but to sell it; that in making the sale, the purchasers did not act as directors in behalf of the bank, but the bank, through other officers and directors of the bank, acted in their behalf, and authorized and made the sale; that, in addition to this, the complainant was duly informed and consulted by the defendants, and gave his express assent to and subsequent sanction of the sale and transfer as made, and with full knowledge of the facts, all as aforesaid; that the said stock in fact remained depressed, and did not rise in the market, but at times fell lower, during and for a year afterwards; and, as they verily believe, the subsequent rise and appreciation of the stock in the market was occasioned largely by the subsequent legislation

in Michigan, the consolidation of said companies, the introduction of new machinery, and the rise in value of copper, and the efforts of new and other men who took hold of it; that in fact only three dollars a share had been paid on the said Hecla Mining Stock when it was originally pledged to defendants as aforesaid. The defendants deny each and every allegation, statement, and charge in said bill of complaint not hereinbefore specifically admitted or denied, so far as they are inconsistent with the statements and averments hereinbefore and hereinafter made in this answer.

16

And these defendants, further answering, say in reply to the specific interrogatories to them propounded in said bill of complaint as follows, to wit:

First. They say that the said complainant did borrow of them, October 17, 1866, $6,500, and pledge for the loan, which was a temporary one, payable on demand with interest, one hundred shares of the capital stock of the Hecla Mining Company; and that he borrowed in the same manner, and on the same terms, $20,000 more, October 19, 1866, pledging likewise as collateral security three hundred and fifty more shares of said stock; but not otherwise than this.

That the same was loaned and the stock pledged in the circumstances and the manner and with the representations hereinbefore particularly set forth and averred specifically.

Second. In answer to the question numbered two, they say that the Hecla Mining Company and the Calumet Mining Company did unite and form a new corporation under the name of the "Calumet & Hecla Mining Company," as inquired of. That they understand this from information, and so state it, and that it was done in May, 1871. Whether they did issue four hundred and fifty shares of its stock, for and in place of the said four hundred and fifty shares in the said Hecla Mining Company, or whether the said new corporation have, by issuing and dividing other shares, now increased the said four hundred and fifty shares to nine hundred shares, these defendants are ignorant, save as informed by said bill and otherwise, and thus cannot answer with certainty; that they have been so informed by said bill, and have so heard and understood otherwise; but just what new stock was issued, how much, and when, and for what, they cannot say or state with definiteness; that they never had or received any stock in place of said four hundred and fifty shares, nor any other stock or cash, as dividends or otherwise, connected with or growing out of the same, either directly or indirectly, or through any party or parties acting under their authority, or in their behalf, in any respect.

17

Third. In answer to the third interrogatory, they say they cannot say whether the Calumet and Hecla Mining Company has paid any dividends upon the stock inquired of from any knowledge of their own; that from information derived from said bill, and from what they have heard otherwise generally they presume and understand that it has, and to the extent set forth in said bill of complaint, but just what they were when paid or to whom paid they cannot say, as they have not the requisite knowledge or figures to enable them to do so. Certain it is, none were ever paid to these defendants, directly or indirectly, either to them, or to any party or parties acting under their authority or in their behalf, for stock issued in place of said four hundred and fifty shares of Hecla Mining Company, or any way connected therewith. They are informed and believe that, other than this, the dividends were made and paid as set forth in said bill of complaint, and went to the benefit of the then stockholders. And these defendants deny the charges

made against them in said bill, and without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby fully and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ELIOT NATIONAL BANK,
By R. B. CONANT, *Cashier.*

A. A. RANNEY,
Solicitor for Defendants.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

MAY 21, 1872.

Subscribed and sworn to before me.
[SEAL.] JOHN G. STETSON,
Notary Public.

18 At the same term the following replication was filed, namely:

Replication.—Filed June 27, 1872.

The replication of Charles L. Hayward to the answer of the said Eliot National Bank:

This repliant, saving all exceptions to the said answer, for replication thereto, saith that he will aver and prove his said bill to be true and sufficient in law to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied to by this repliant. Without this, that anything else in said answer, material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true. All which this repliant is ready to aver and prove as this court shall direct, and humbly prays as in and by his said bill he has already prayed.

By his solicitor, J. M. KEITH.

18*a* This cause was thence continued from term to term to this present term, when publication of the testimony is ordered, and the cause is set down for hearing, and fully heard before the honorable Nathan Clifford, associate justice, and the honorable John Lowell, district judge, sitting together. On the sixth day of October the opinion of the court is read by the honorable Nathan Clifford, associate justice, and it is thereupon ordered, adjudged, and decreed that the bill of complaint in this cause be, and the same is hereby, dismissed, with costs to the defendant taxed at

From this decree the said Charles L. Hayward, complainant, claims an appeal to the Supreme Court of the United States, and gives good and sufficient security that he will prosecute his said appeal to
18*b* effect, and said appeal is allowed accordingly.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

At the hearing of said cause in said circuit court the following evidence was used, namely:

EVIDENCE FOR COMPLAINANT.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States in equity, as amended, before me.

EDWIN T. NASH,
Special Examiner.

Present, E. F. Hodges, esq., of counsel for complainant; A. A. Ranney, esq., of counsel for defendant.

Deposition of John Gardner Weld.

FEBRUARY 5, 1873.

Direct examination by E. F. Hodges, esq., of counsel for complainant:

Int. 1. What is your name, age, residence, and occupation?

Ans. John Gardner Weld; 52; West Roxbury; merchant.

Int. 2. What was your business and your business connections in August and September, 1868?

19 Ans. Merchant; I was connected in business with W'm H. Goodwin. There was no partnership.

Int. 3. Did you or not purchase of the Eliot National Bank, in Sept. 1868, any shares in the Hecla Mining Company; and, if yea, what number?

Ans. I did; 150 shares; I had a half interest in that. I had a joint interest with W'm H. Goodwin.

Int. 4. With whom did you make the negotiations for this stock?

Ans. W'm H. Goodwin.

Int. 5. With any one else?

Ans. No one else.

Int. 6. When did you first commence negotiations?

Ans. I don't recollect.

Int. 7. Was M'r Goodwin acting for the Eliot National Bank, or in his private capacity in those negotiations?

(Objected to as asking for an opinion.)

Ans. I supposed he was acting for the Eliot National Bank. I cannot state positively.

(Answer objected to by defendant's counsel as incompetent. His supposition is not competent.)

Int. 8. How long were negotiations pending between you and M'r Goodwin about this matter?

Ans. I should think about five minutes.

Int. 9. All confined to one interview?

Ans. As near as I can recollect, it was. It was some four years ago. I can't state minutely as to those questions.

Int. 10. Was the stock transferred the same day you made the purchase?

Ans. I cannot tell. I never saw the stock.

Int. 11. You did not, then, procure the transfer on the books of the company?

Ans. I had nothing to do with the bank in the matter. I did not.

Int. 12. To whom did you pay the consideration for the stock?

Ans. We gave a joint note to the Eliot National Bank. By we I mean Goodwin and myself. I produce the note.

(Note offered in evidence, marked "Exhibit No. 1, E. T. N., Examiner.")

Int. 13. When was that note given; at its date?

Ans. I do not remember.

Int. 14. Have you any recollection or impressions that it was given at any different time than its date?

Ans. I have not.

Int. 15. The interview before spoken of, when you made the purchase of M'r Goodwin, was that not the same date with that note?

Ans. I do not recollect.

Int. 16. Give your best impressions.

Ans. I haven't any to give.

Int. 17. Had you previously to giving that note made any application to the Eliot Bank in relation to discounting that note, or any other note, for about that amount? That is, in reference to or connected with the Hecla stock?

Ans. I had not.

Int. 18. I understood you to have said that you never saw the certificates of stock. Was it any part of your arrangement that the stock should remain as security for that note, or remain in the bank until the note was paid?

Ans. I should say that in my connection with M'r Goodwin, he always attended to all financial matters himself. I do not recollect anything farther.

Int. 19. Why did you not take the certificates when the note was given?

(Objected to as assuming what don't appear; as assuming that M'r Goodwin or he did not take them.)

Ans. I had nothing to do with the negotiations with the bank.

Int. 20. Had you no conversation with M'r Goodwin concerning that stock before the interview at which you bought it?

Ans. I cannot state whether I had or not. Don't recollect, so long a period has passed.

Int. 21. Did you have anything to do with any change in the stock before referred to, and substituting that stock in the Calumet and Hecla Company?

Ans. I did not.

Int. 22. The note, Exhibit No. 1, was paid at maturity, was it not?

Ans. I would say that I relinquished all interest in the matter
21 to M'r Goodwin, he agreeing to pay the note and holding me harmless. I relinquished my interest in the stock in consideration of his paying the note. I don't know whether it was ever paid or not. I suppose it was paid.

Int. 23. When did you make that agreement with M'r Goodwin?

Ans. At the maturity of the note.

Int. 24. Have you, then, ever had anything to do with the stock save as you have before in this deposition stated?

Ans. I have not.

Int. 25. When you made the first arrangement with M'r Goodwin, was it or not a part of your understanding and agreement that he should assume the whole transaction?

Ans. It was agreed between us that at the maturity of the note it should be optional with me to keep the stock or not as I chose.

Int. 26. When you made that negotiation with him, did you know the market value or the actual value of that stock?

Ans. I did not know to a certainty.

Int. 27. Had you ever made any inquiries or investigations of the matter?

Ans. I have no recollection of doing so.

Int. 28. Was your negotiations for that stock entered upon the books of your concern, or was there any memorandum by which you can refresh your memory as to the date of that negotiation?

Ans. I think our books will show. M'r Goodwin kept the books, and is more familiar with them than I am. In our assets in January, 1869, in making up a balance-sheet, appears one hundred and fifty shares of Hecla Mining Company, and among our payments appears the note due March 11, 1869. A note was given in payment for it, $13,085.72. We made up a balance-sheet to February 1st, every year.

Int. 29. Will you please look upon your books and see if you have any memorandum by which you can ascertain the date of the purchase of that stock of you by M'r Goodwin before named?

Ans. I will do so.

(Cross-examination waived by counsel for defendant.)

22 MARCH 12, 1873.

Witness Weld appears and states that he has looked at his books and that nothing appears on his books except what he has shown here.

Int. 30. When you purchased the stock was there any entry made upon your books of the terms upon which you purchased?

Ans. There was none.

J. G. WELD.

Deposition of William H. Goodwin.

FEBRUARY 5, 1873.

Direct examination by E. F. Hodges, esq., of counsel for complainant:

Int. 1. What is your name, age, residence, and occupation?

Ans. William H. Goodwin; 51; West Roxbury; merchant.

Int. 2. Did you or not, about Sept. 8th, 1868, have an interest in any purchase of Hecla Mining stock from the Eliot National Bank?

Ans. I did.

Int. 3. What interest, and in how much stock?

Ans. I had a half interest with M'r J. G. Weld in 150 shares.

Int. 4. With whom did you negotiate the purchase of that stock?

Ans. The president of the bank.

Int. 5. When?

Ans. Either the 7th or 8th of September, 1868. The negotiations extended over two days.

Int. 6. Did you negotiate with anybody else besides the president? Name the president.

Ans. M'r John Demerritt was the president. The negotiation was made through him.

Int. 7. When did you take the certificates of that stock, if you ever took them?

Ans. I took the certificates about the 8th of September; whether that is the particular date or not, I can't state.

Int. 8. Did you ever have, and when, those certificates issued to yourself by the company?

Ans. I did. About the 8th of September; I don't recollect the day.

Int. 9. Were they issued to you alone, or to you and J. G. Weld, or to you and some other person?

23 Ans. In my name alone.

Int. 10. Did you retain possession of the certificates of the stock from that time forward?

Ans. I did.

Int. 11. Were they ever in any way left with or pledged to the bank as security for a note given for the purchase-money?

Ans. Never.

Int. 12. At the time the purchase was made, had you personally made investigations of the value of the stock?

Ans. I had made inquiries in a general way.

Int. 13. Had you investigated the records of the company to ascertain the property held by the company?

Ans. Never, particularly.

Int. 14. Had you anything to do with the surrender of those certificates, and the taking of substituted certificates of the Calumet and Hecla Company; if so, what?

Ans. I surrendered those, and took the others as they came along; as they were issued by the company.

Int. 15. I referred more particularly to the issue by the Calumet and Hecla Company of certificates of stock in substitution of these 150 shares, and not the issue of certificates of stock given as a dividend. Did you not take first 150 shares of Cal'met and Hecla in substitution of 150 shares of the Hecla? State how it was.

Ans. I think I must have. May 10, '71, I surrendered one hundred and fifty shares of Hecla, which I had from the bank, and fifty shares which I had from another quarter, and took a certificate of two hundred shares of Calumet and Hecla. The fifty other shares which I had in the company were included in this certificate, No. 94, for two hundred shares.

Int. 16. Can you give me, if you have not done, the number of the certificate issued to you on or about the 8th of September, 1868, for one hundred and fifty shares?

Ans. No. 263.

Int. 17. Please give the number of the certificate surrendered by the bank, for which, or for a part of which, said certificate No. 263 was issued to you?

Ans. I never knew it.

24 Int. 18. Did you personally take from the Hecla company said certificate, No. 263?

Ans. I did not.

Int. 19. From whom did you receive that certificate?

Ans. I received it from the bank.

Int. 20. From what person?

Ans. I don't recollect.

Int. 21. You are positive you took it on or about the 8th of September, 1868, are you?

Ans. As near as I can recollect.

Int. 22. Did you receive it when you delivered the note produced by M'r Weld, and marked "Exhibit No. 1"?

Ans. I did.

Int. 23. In whose handwriting is that note?

Ans. I can't say.

Int. 24. Can you state in whose handwriting are the words, "with interest at six per cent"?

Ans. I don't know.

Int. 25. Whose do you think they are?

Ans. I think one of the clerks in the bank.

Int. 26. In whose handwriting is the filing of the note?

Ans. In my handwriting.

Int. 27. What is the name of that clerk?

Ans. I don't know which one it was.

Int. 28. In pencil, under that filing, appears to be written in figures "150," and the word "shares"; in whose handwriting is that?

Ans. I don't know.

Int. 29. Are the stamps on that note cancelled?

Ans. I think they were intended to be.

Int. 30. Will you state what sign you see of cancellation on the different stamps?

Ans. I don't see any.

Int. 31. Will you state what dividends of money and what of shares have been received upon the 150 shares of Calumet and Hecla stock, or of Hecla stock, since Sept. 8, 1868, and all like dividends upon the shares issued as dividends?

Ans. I can't state the cash dividend without my book. The stock dividend was 150 shares.

Int. 32. Have you your book with you?

Ans. No, sir.

Int. 33. Will you examine it and answer interrogatory 31 as to the cash dividends, with their dates?

Ans. I will. I have since done so, and they appear on the paper, which I hereby offer to be attached to this deposition.

(Paper offered in evidence, marked "Exhibit No. 2, E. T. N., Examiner.")

Cross-examination by A. A. Ranney, esq., of counsel for defendant:

Cross int. 34. Will you state whether the note which you say was given to the bank for the 150 shares of stock was paid; and, if so, by whom?

Ans. It was paid at maturity by me.

Cross-int. 35. Who has received, had, and enjoyed the stock and cash dividends which has been paid since upon the stock bought, or that which you received in the place of it afterwards?

Ans. I have.

Cross-int. 36. Has the bank or any one else since you purchased the stock had interest in the same, or any dividends received from it, directly or indirectly?

Ans. No one except myself; neither bank or any one else.

WILLIAM H. GOODWIN.

Deposition of John P. Robinson.

FEBRUARY 6, 1873.

Direct examination by E. F. Hodges, esq., of counsel for complainant:

Int. 1. What is your name, age, residence, and occupation?

Ans. John P. Robinson; Boston; sixty-three years; merchant.

Int. 2. Had you in 1868 any official relation to the Eliot National Bank; if so, what?

Ans. I had, and was a director.

Int. 3. Did you receive from the Eliot National Bank on or
26 about Sept. 8, 1868, any, and what number of, shares of stock of the Hecla Mining Company?

Ans. I bought of John Demerritt, the president, 150 shares, and received a certificate for the same at that time.

Int. 4. Did you make the negotiation with any one beside John Demerritt; if so, whom?

Ans. No one but him.

Int. 5. When did you make that negotiation?

Ans. It was completed September 8, 1868, and was begun a day or two previous.

Int. 6. Where was the negotiation begun, and where completed?

Ans. It was completed at the directors' room, at the Eliot National Bank. The commencement might have been there, or might have been elsewhere. I cannot state.

Int. 7. Did you procure the transfer to yourself of that stock?

Ans. I did not in person.

Int. 8. How was it done?

Ans. I do not know.

Int. 9. Who handed to you the certificate, and when?

Ans. I received it in the Eliot National Bank from the president, or one of the clerks who was present.

Int. 10. What was then done with that certificate, and where was it kept for the next year?

Ans. I took it to my counting-room and put in an envelope and placed it in my safe with my other securities.

Int. 11. Did you place with it any memorandum?

Ans. I think not.

Int. 12. Will you be kind enough to search your recollection and see how positively you will make that statement?

Ans. I ordinarily indorse on the envelope the security enclosed. I am quite sure that is all the memorandum connected with the certificate.

Int. 13. When you purchase bank-shares or other stocks for investment and place them with your securities, is it your custom to place with them any memorandum save where there is some specific thing which you desire to have presented with those securities?

Ans. Nothing.

27 Int. 14. Please state how you paid for those shares, when and where, if you paid for them?

Ans. On the receipt of the certificate I gave my note, indorsed by M'r John M. B. Reynolds, for the purchase-money, payable in six months, at the Eliot National Bank, with interest at the rate of six per cent. per annum, for $13,085.72.

Int. 15. When was that note paid, by whom, and where is it?

Ans. The note is probably burned with my other papers. I have been searching for it since I received the summons. It was paid by me either in person or by one of the clerks who does my banking business. A short time before the note matured, having made arrangements to go to Florida with my family, I went to the bank and paid six months' interest on the note, M'r Reynolds indorsing over his signature, "Demand and notice waived," and I negotiated with the bank to have it remain as a call-loan on demand, until I should return, unless the bank should desire it paid sooner, in which case Loring & Reynolds, a firm in which I was a special partner, were to pay it from cash funds I had in their hands. The journal or memorandum book showing the time it was

paid was destroyed in the fire of Nov. 9, and I have no means of stating the exact time.

Int. 16. Do you suppose it was paid from finding an entry to that effect, on your return from Florida, or did you find the note among your papers, marked as paid, or in any way cancelled?

Ans. It was paid after my return, by myself in person or one of the clerks who did my banking business. I recollect the cashier stated to me that the bank was short, and asked me if it was convenient for me to pay that note. I said yes, and it was paid the same day as above. I returned from Florida some time in May, 1869.

Int. 17. Prior to Sept. 8, 1868, were you the owner of any stock in the Hecla Mining Company?

Ans. I was not.

Int. 18. Prior to your making the purchase you have spoken of, did you visit the office of the Hecla Mining Company to investigate the property held by it to enable you to estimate the value of its stock?

Ans. I did.

Int. 19. At what time?

Ans. I do not recollect the exact time. I was an owner in the
28 Calumet company, and was in the office of the Hecla company, and had frequent conversations with M'r Quincy A. Shaw, prior to that time, concerning the Hecla company.

Int. 20. Did the Hecla company and the Calumet company occupy the same offices?

Ans. I think they did, or they had a suite of rooms in the same building.

Int. 21. Can you state if the Hecla and Calumet companies at any time consolidated their affairs and stock, and, if so, when?

Ans. They were consolidated in or prior to May, 1871.

Int. 22. Did you surrender the certificate of the 150 shares which you received from the Eliot National Bank, and did you receive any, and what number of shares in the consolidated company therefor?

Ans. I did surrender that certificate, and received a certificate for 200 shares, covering that 150, and 50 which I had previously purchased in the Calumet. The certificate I then received was numbered 173. I received it on or about May 1, 1871.

Int. 23. Can you state the dividends in stock and in money that have been paid by the Calumet and Hecla company to you on the 150 shares surrendered by you?

Ans. I cannot now. I have no doubt that my dividends in cash were the same as appears by the statement of M'r Goodwin to have been paid him. My dividends in stock amount to 150 shares.

Int. 24. I understand you to have said that you purchased these 150 shares of John Demerritt, president of the Eliot National Bank. Were there any conditions annexed to that bargain?

Ans. There was a condition that I was to have six months' credit on the purchase-money, at six per cent. interest, giving an approved indorser, but none other.

Int. 25. Did you intend to be understood that the purchase was absolute, and that you reserved no right to surrender the purchase, and have the note restored to you?

Ans. I do.

Int. 26. That there was no understanding to that effect?

Ans. I do.

Int. 26*a*. Could you not, when you applied to have the note re-

29 main as a call-loan, have then had the bargain rescinded, and was not some such right reserved between you and the bank?

Ans. No such right reserved. I can't tell what I could have done in making a new bargain if I had tried?

Int. 27. When the purchase was made was there an entry of the transaction made on your books, and did the note appear on your note-book as in the ordinary course of your business?

Ans. I think that was the only note that I owed individually; my business for a long time has been in a partnership-firm, and I had no occasion to give individual notes. I undoubtedly made a memorandum of the purchase, and the amount, date, and maturity of the note. If I did so, it was lost in the fire referred to above, and I have no original memorandum.

Int. 28. How long prior to Sept. 8, 1868, had you been an owner of stock in the Calumet Company?

Ans. It was purchased the summer previous to that time. I think in or prior to the month of August.

Int. 29. What day in August, and please add the year?

Ans. August 27, 1868, or prior to that time.

Int. 30. When did your acquaintance with the Calumet stock and the Hecla stock begin?

Ans. I cannot tell.

Int. 31. Did you know anything of the Hecla stock prior to the purchase of the Calumet stock above referred to?

Ans. I did.

Int. 32. From M'r Quincy A. Shaw, before named?

Ans. Yes.

Int. 33. Did you know what property was owned by the Hecla Co.?

Ans. I didn't know the extent of their property.

Int. 34. Did you consider yourself at that time sufficiently instructed in the assets of that company to be a judge of the value of its stock, present and prospective?

Ans. I knew something of its then present and prospective value, but not enough to determine with accuracy.

Int. 35. Had you ever been personally upon the property where the company's mines are located?

Ans. I had not, and have not now.

30 Int. 36. Such estimate as you formed of the value of the company's stock was formed from conversations with others, was it not?

Ans. Yes.

Int. 37. Did you ever examine the books of the company?

Ans. Never.

Int. 38. Did you gather your information entirely or principally from M'r Shaw?

Ans. Partly there, and partly elsewhere.

Int. 39. From M'r Demeritt?

Ans. I have had a conversation with him upon the subject.

Int. 40. Any one else?

Ans. Yes, sir.

Int. 41. Name those others that gave you information upon which you formed your estimate.

Ans. I cannot name them all, but will mention M'r Goodwin and M'r White. I had obtained the congressional reports on mining interests in the United States, had examined them to a considerable extent, and

had conversed with various parties in reference to the whole mining interests in the United States.

Int. 42. When did you first have any conversation with M'r Demeritt upon the subject of the value of this stock?

Ans. I cannot tell.

Int. 43. Did you at any time prior to Sept. 7, 1868?

Ans. I did.

Int. 44. Can you not approximate the time when you first talked with him about it?

Ans. I cannot exactly.

Cross-examination by A. A. Ranney, esq., of counsel for defendant:

Cross-int. 1. When you say you bought the 150 shares of stock in the Hecla Co. of M'r Demeritt, the president of the bank, do you mean that you bought it of him personally, or that you bought it of the bank, through him?

Ans. Of the bank through him.

Cross-int. 2. At that time had you any knowledge or information as to the directors of the bank authorizing him or directing him to sell it?

(Objected to.)

31 Ans. I had.

Cross-int. 3. At that time had you any knowledge or information as to M'r Hayward's having authorized the sale?

(Objected to as asking for hearsay information.)

Ans. I had.

Cross-int. 4. What knowledge and what information had you on the subject?

(Objected to.)

Ans. I had M'r Hayward's written order authorizing its sale shown to me. After I had made the proposition to buy it at a certain rate, it was allowed to remain over for a time, I think one day, for M'r Demeritt to see M'r Hayward in reference to my purchase. He reported M'r Hayward's desire and approval, and the purchase was completed, as I have stated here before.

(Answer objected to.)

Cross-int. 6. When you say the sale to you was allowed to stand over for the purpose stated, and that M'r Hayward's approval was reported to you, do you confine it to the sale to you alone, or the sale to the other parties, to wit, M'r Goodwin and M'r White?

(Objected to.)

Ans. I mean to include the sale to M'r Goodwin and M'r White and myself.

Cross-int. 7. Was the proposition for the sale of this 150 shares to you alone made separately, or was it the proposition on the part of bank to sell the whole to these several parties in equal amounts?

Ans. It was to sell the whole. I can't say in equal amounts. It was the proposition that the whole should be sold.

Cross-int. 8. Had the Hecla Company ever kept an account at your bank; and, if so, for how long a time before this purchase?

Ans. They had, I should think, for two years or thereabouts; perhaps longer.

Cross-int. 9. While the 450 shares of stock in the Hecla Company were in your bank after being placed there by M'r Hayward, state whether the value of the stock and the condition and prospects of the company were, or were not, the subject of conversation among the board of directors of the bank, and how frequently?

(Objected to.)

32 Ans. They were, very frequently.

Cross-int. 10. Had you or not any information or knowledge on that subject that was not fully communicated and known to the other members of the board?

Ans. I had not that I know of. They might have obtained the same information if they did not possess it.

Cross-int. 11. Did you ever withhold any information from the bank which would enable them to determine the real value of the stock?

Ans. I never did.

Cross-int. 12. Do you know whether the other directors of the bank knew of or authorized the sale of the stock which was made to you, M'r Goodwin, and M'r White?

(Objected to.)

Ans. The directors instructed M'r Demeritt to sell the stock.

Cross-int. 13. Since the stock was sold to you, and the consolidation spoken of in your direct examination effected, who has had and enjoyed the stock and cash dividends made upon it?

Ans. I have.

Cross-int. 14. Has the Eliot National Bank had any interest or ownership in the said shares sold to you, or in the dividends made and received since the sale was made, either directly or indirectly?

Ans. It has not.

Cross-int. 15. Was the sale of stock made to you and the other purchasers named made without first getting the approval of M'r Hayward to the same specifically in addition to the other written authority which the bank then held?

(Objected to, and counsel for the complainant requests the examiner to caution the witness to speak only of his personal knowledge and not what some one else has reported from M'r Hayward.)

Ans. It was reported to us, who were purchasers, that M'r Hayward desired the sale to be made at the rate that we were to, and did, buy. After the price was agreed upon, it was held in abeyance that he might be consulted, and after that consultation had been reported, the purchase was completed.

Cross-int. 16. Will you state who, by the arrangement, was to see and consult him, and who made the report?

33 Ans. John Demeritt, the president, who had been directed to make the sale.

Direct examination resumed:

Int. 45. (Not waiving objection to the fourth cross int.) In answer to the 4th cross-interrogatory, you have said M'r Hayward's written order was shown to you. By whom was it shown, did you read it, and when was it shown?

Ans. I think it was shown me by the cashier. I read it frequently, and it was read to the other director at various times. I probably saw it soon after it was given to the bank. I can't tell the date exactly. Some time in August, 1868, I think, a vote was passed to inform M'r Hayward that unless he would make a payment upon his loan, a certain amount weekly for two or three weeks, they should sell the stock. The order to sell was then produced.

(Witness's statement of the sale objected to by counsel for the complainant.)

Int. 46. When did you last see that order?

Ans. I cannot say.

Int. 47. Within one month?
Ans. I presume not.
Int. 48. Within two?
Ans. I cannot tell.
Int. 49. Have you seen it since the suit begun?
Ans. I have.
Int. 50. In your answer to the 12th interrogatory, you have said "The directors instructed M'r Demeritt to sell the stock." Was that instruction in writing or by a recorded vote of the directors?
Ans. The vote of the directors was recorded, M'r Demeritt being present. That was considered an adequate direction.
Int. 51. By whom was it so considered?
Ans. By all the directors voting upon it, I suppose; in fact, I know.
Int. 52. How was that judgment manifested?
Ans. By a discussion of the propriety of selling and by urging the sale to be made. It was not known at that time that those who had offered to purchase it would be the purchasers, because M'r Hay-
34 ward was to have the first opportunity, if he or his friends could raise the money to pay the debt to the bank.
Int. 53. Was it entered of record that M'r Hayard was to have that opportunity offered him?
Ans. It was not.

MARCH 12, 1873.

Int. 54. Cross-interrogatory 12 inquires of you in these words, "Do you know whether the other directors of the bank knew of or authorized the sale of the stock which was made to you and M'r Goodwin and M'r White?" and you answered, "The directors instructed M'r Demeritt to sell the stock." Do you in that answer refer to the vote passed by the board of directors on the 17th of August, 1868?
Ans. I do in part refer to that, and I know that the directors were consulted and advised about it; those who were present at that time. Those who were not present at that time were seen and consulted afterwards. M'r Walter Hastings, one of the directors, was in Europe at that time, and of course he could not be consulted.
Int. 55. Please state the exact terms upon which you purchased that stock.
(Objected to as a repetition of a question already put and answered.)
Ans. At the time I answered the same question before I had my book with me, and stated the date of purchase and the amount, which I think was the 8th of Sept., 1868; the amount $13,085.72. I stated that I gave my note, indorsed by John M. B. Reynolds, payable in six months, with interest at the rate of six per cent. per annum. These were the terms of the purchase.
Int. 56. Was any price per share agreed upon, or how did you fix the sum, $13,085.72, for one hundred a fifty shares?
Ans. When the negotiation for the purchase commenced, it was supposed that somewhere a little over eighty dollars, perhaps eighty-two or eighty-three dollars per share would be sufficient to pay the loan and interest due from M'r Hayward to the bank. It was agreed on the part of M'r White, M'r Goodwin, and myself, that we would make the purchase at the price then specified, which was something less than we actually paid, which we then supposed would cancel M'r Hayward's indebtedness. When the interest was made up, and the interest upon the assessments, it was found that it would cost $87\frac{24}{100}$, as the figures
35 were then made, to pay the bank in full. The purchase was based upon that amount, and my note was given and the stock trans-

ferred at that figure, viz. 887 24/100 per share. It was afterwards found that that did not quite—some sixty or seventy dollars, more or less, it lacked of paying M'r Hayward's indebtedness: but we having completed the purchase, the stock having been transferred and settled for according to the terms and conditions of purchase, the bank had no claim upon us for the farther amount, and the deficit, say some sixty or seventy dollars, M'r Hayward agreed to pay as soon as he was able.

(Answer objected to, after the word 87.24, as irresponsive.)

Int. 57 (de bene, not waiving objection). When did you first hear of the sixty or seventy dollars above alluded to?

Ans. Within a few days; perhaps the next day following the purchase.

Int. 58. Will you swear that you ever heard of that until within the past thirteen months?

Ans. I will.

Int. 59. Do you personally know the complainant in this case, M'r Hayward?

Ans. I have a speaking acquaintance with him, and was for some years a director with him in the Eliot Ins. Co.

Int. 60. Were you present at the meeting of the board on the 7th of September, 1868?

Ans. If that was the day that that vote was passed, which has been referred to when we instructed M'r Demeritt to sell, I was present. If it was not, I cannot say positively, although I presume I was present on the 7th day of September.

Int. 61. You have heretofore stated substantially, that on the 7th of September, 1868, the proposition was made to buy and sell upon certain terms, and that a day was given for M'r Demeritt to see M'r Hayward; that is the meeting I refer to. I mean, were you present at the meeting when that proposition was made, and when the day was given to see M'r Hayward, whether the 7th of September, or whatever day it was?

(Objected to as assuming what has not been stated.)

Ans. I was present at that meeting.

Int. 62. Can you now more nearly fix the time when you paid the note given for that stock?

36 Ans. I cannot. In fact, I have given it no thought since I was here before.

Int. 63. Did you pay it prior to the year 1870?

Ans. I presume I did.

Int. 64. Are you positive?

Ans. I am quite sure.

Int. 65. Was it paid in cash, or by giving another note?

Ans. It must have been paid in cash, I think. I presume it was. I had money in the hands of Spring & Reynolds to pay it, and when the bank called, as I stated before, it was paid.

Cross-examination resumed:

Cross-int. 18. After you, M'r Goodwin, and White proposed to be the purchasers of the stock, and when the question between you and the bank was whether they would sell to you, did you act with the directors in behalf of the bank, in determining whether they would sell to you, or in making the sale by the bank to you?

(Objected to.)

Ans. I did not vote. I stated at the time, as I was to be one of the purchasers, I would not vote, and I would not consent to make the purchase unless all the directors should approve of the sale; when I say all, I do not include M'r Hastings, who was in Europe.

Cross int. 19. Did M'r Goodwin and M'r White, in the sale made to them, act or vote with the bank, to your knowledge?

(Objected to.)

Ans. I think that one of them was present, and that one did as I did, that is, decline to vote.

Cross-int. 20. At the time when the other bank directors determined to sell to you, was there a vote recorded, or was it other expressing of opinion?

(Objected to.)

Ans. I think there was no record.

Cross-int. 21. Will you state whether the proposed purchase was distinctly and fully stated to the other directors at the meeting, and the sale authorized and determined by them?

(Objected to.)

Ans. It was fully stated to the directors, either at the meet-
37 ing, or those who were absent were seen, and they fully approved of the whole purchase.

Cross int. 22. Do I understand you as remembering whether that the time the purchase was stated and authorized and approved was at the meeting on the 7th of September, or on some other day?

Ans. I am not positive that it was the 7th of September. My books show that the purchase was made the 8th, and I think the conversation in regard to the purchase might have been held at various times, a few days previous; perhaps two or three more, and perhaps the day previous to the time I made the purchase.

Cross-int. 23. Do I understand you that a full day was given and allowed to M'r Hayward to allow him to purchase the stock before you took it; or that time was allowed to see him and see whether he would do it; or, if not, whether he would consent to you and the other parties taking it on the terms named?

Ans. I think time was allowed to see him. I don't think it was limited.

Cross int. 24. Before you did make the purchase did you have any report from him as to what he would do, and whether he agreed to this sale to you, M'r Goodwin, and M'r White; and, if so, what was it?

(Objected to.)

Ans. Before the purchase was made, and in fact before any negotiations were made on my part to make a purchase, it was reported to the board that M'r Hayward said he was poor; could not pay the bank; whatever they obtained on his debt they must get by the sale of the stock. After these negotiations were commenced by myself, M'r White, and M'r Goodwin, M'r Demeritt had an interview with M'r Hayward, and reported to the board that M'r Hayward would be very glad to have it sold to us.

(Answer objected to by counsel for complainant, so far as it states the report made by M'r Demeritt, being hearsay.)

Cross-int. 25. At the time you purchased this stock, state, if you know, what its market selling price was.

Ans. I think about 82 or 83 dollars a share. I am not positive. It was afterwards lower.

Cross-int. 26. Did you at that time examine and see if the price you were paying was at or more than the then market value?

38 Ans. It was a little more.

Cross int. 27. How long afterwards did it run down in the market?

Ans. A friend of mine bought some at 78 dollars a share, which was ten dollars less. I don't know as that was the lowest price.

Cross-int. 28. How long a time after you purchased did it remain depressed in the market?

Ans. I should think twelve months, but do not know exactly.

Cross-int. 29. Do you remember whether it depreciated much, if any, before the consolidation referred to?

Ans. I don't think it did a great deal, but do not know positively.

Cross-int. 30. Do you recollect whether its market value, after you purchased and before the consolidation referred to above, was ever above the price which you paid for it in your purchase?

Ans. I do not know.

JOHN P. ROBINSON.

Deposition of Royal B. Conant.

Direct examination by E. F. Hodges, esq., of counsel for complainant:

FEBRUARY 7, 1873.

Int. 1. What is your name, age, residence, and occupation?

Ans. Royal B. Conant; ward 16, Boston; age, thirty-five the 7th day of last November; cashier Eliot National Bank. I have been cashier about seven years.

Int. 2. Were you cashier of that bank in October, 1866?

Ans. I don't remember exactly who was cashier at that time.

Int. 3. Have you any notes signed by C. L. Hayward, dated about the 17th or 19th of October, 1866, the first for $6,500 and the second for $20,000?

Ans. I have not.

Int. 4. Have you, as cashier of the bank, ever seen any such notes?

Ans. Yes, sir.

Int. 5. When did you last see them and where?

Ans. I could not state at what date I last saw them, but the last time I had them I delivered them to M'r Demeritt, the president of the bank.

39 Int. 6. If those notes were now in the bank among the papers of the bank, would they, or not, be in your custody as cashier?

Ans. Not necessarily, I should say.

Int. 7. In whose custody would they be?

Ans. That of the president or cashier.

Int. 8. Have you examined the papers of the bank to see if they are now there?

Ans. No, sir; they are not in my keeping; I am satisfied of that.

Int. 9. Have you examined the papers of the bank to see if they are among those papers?

Ans. No, sir.

Int. 10. You were directed by the subpœna served upon you this morning to bring with you, among other things, those notes. Why have you not examined the papers of the bank to see if they could be produced?

Ans. For the reason that I have not them in my possession among any of the papers of the bank.

Int. 11. I understand, then, that you have not searched among the papers of the bank for those notes to produce them here?

Ans. Yes, sir.

Int. 12. Have you brought with you any papers signed by C. L. Hayward, purporting to be any authority to sell certain shares of the Hecla Mining Co., held by the bank as collateral security for a debt due from him? If you have, please produce it.

Ans. I have. I now produce it.

(Paper produced and marked for identification, "Exhibit 3, E. T. N., Examiner.")

Int. 13. In whose handwriting is the body of that paper?

Ans. In my handwriting.

Int. 14. Have you, as cashier, anywhere, any other written paper signed by M'r Hayward, purporting to give any authority to sell the shares of Hecla Mining Co., heretofore referred to?

Ans. No, sir.

Int. 15. Have you brought with you the records of your bank, or of the directors, containing any vote or votes of said corporation or its directors, relating to the sale of said stocks, particularly referring to the records of the months of August and September, 1868?

40 Ans. I have not brought the original records of the bank with me. It is a bulky book, and I have brought a copy, and if necessary I will go and get the original.

Int. 16. The copy referred to by you in your last answer is a copy of the vote purporting to be passed on the 17th day of August, 1868, which vote is embodied in the respondent's answer in this case, is it not?

Ans. Yes; it is embodied in the answer.

Int. 17. Is there no other vote or record of the action of your board of directors touching the sale of this stock than the one, a copy of which you now produce? I mean recorded.

Ans. There is no other recorded vote.

Int. 18. Have you brought with you the letter-book of the bank in which are kept copies of the letters written by the bank relative to the sale of this stock?

Ans. I have not.

Int. 19. Are there any letters on the books of the bank relative to the sale of this stock, or in any way referring to it prior to September 8, 1868?

Ans. Possibly; but I think not.

Int. 20. Have you looked to see?

Ans. I have not.

Int. 21. Are there upon the books of the bank any copies of any letters or notes written to M'r Hayward, the complainant, prior to September 8, 1868, touching or in any way referring to the sale of this stock, always excepting the vote, a copy of which you have before referred to?

Ans. I am not competent to answer that question without an examination. Letters may have been written. They might have been copied, and might not. I am decidedly of the impression that letters have been sent to M'r Hayward in regard to this matter. I write from fifty to one hundred letters a day. I can't remember everything I write.

(Answer objected to as not responsive, and introducing matter not required of.)

Int. 22. Do you not keep copies of the letters written from the bank?

Ans. We have a letter copy-book now in use. At that time

41 letters were copied by hand. All of the letters that go out of the bank may not be copied, but mean to have them as a rule.

Int. 23. Was not that your rule in 1867 and 1868?

Ans. Yes, sir; the same as now.

Ans. For the reason that they were bulky; but will go directly and get them and have them here in five minutes if you want them.

Int. 51. Have you brought with you an original letter written by the complainant to the respondent bank bearing date September 11, 1872?

Ans. I have not, sir; I don't know that such letter exists, but will go to the bank and see.

Int. 52. Will you produce that letter, if one exists, and have the same, or a copy, annexed to this deposition?

Ans. Yes, sir; if I have received such.

(Adjourned.)

FEB. 10, 1873.

Int. 53. Have you brought with you any letter written by the complainant to the respondent bank, dated about Sept. 11, 1872, being the same inquired of in interrogatory 51st?

Ans. Yes, sir.

Int. 54. Will you produce it and have it, or a copy, annexed to this deposition?

Ans. I produce the original.

(Letter produced and marked "Complainant's Exhibit 4, E. T. N., Ex'r.")

Int. 55. Have you brought with you a copy of any response to that letter written by the bank?

Ans. I have, sir.

Int. 56. Will you permit that, or a copy of it, to be annexed to this deposition as an exhibit?

Ans. Yes, sir.

(Letter produced and marked "Complainant's Exhibit 5, E. T. N., Ex'r.")

Int. 57. Have you brought with you the records of the directors' meetings for the months of August and September, 1868? If you have, please produce them.

45 Ans. I have, and now produce them.

Int. 58. Will you point upon those records to every record from Aug. 17, 1868, down to Sept. 8, 1868, that refers to the four hundred and fifty shares of Hecla stock pledged by M'r Hayward, or to the loan made by the bank to him upon that pledge?

Ans. On page 88, bearing date Aug. 17, 1868, appears the record of the vote embodied in the answer, and it is the only recorded vote from the directors' records inquired of on that subject.

Int. 59. Will you please examine the book containing the discounts of the bank, and point out the items which express the discount of the notes given by the purchasers of that stock about Sept. 8, 1868, for the purchase money?

Ans. I will, sir; and now point them out. On discount-sheet No. 40, Sept. 28, 1868, three notes; one signed by J. P. Robinson, maturing March 11, indorsed J. M. B. Reynolds, amount $13,484.82, discount $411.26, net $13,073.56; one maturing March 11th, signed W'm H. Goodwin, indorsed J. G. Weld, $13,484.82, discount $411.26, net $13,073.56; one maturing March 11th, J. H. White, indorsed White, Brown & Co., amount $13,484.82, discount $411.26, net $13,073.56; all dated Sept. 8, 1868, on six months. Interest six per cent. They first appear Sept. 8, 1868, in the temporary-loan account, in book called "Bank Balances No. 3." We have two accounts on the same book, one called the discount loan and the other the temporary loan, and these are in the temporary loan. In a book called "Bank Balances No.

4," date of Sept. 29, 1868, is contained the transfer or credit to temporary loan of these notes, and transfer to notes discounted and debited notes discounted.

Int. 60. For what amount were those notes written in the body of the notes, each of them?

Ans. They were written for $13,085.72, with interest at 6 per cent.

Int. 61. How do you know that? Did those figures appear on the book?

Ans. They appear in the aggregate $39,257.16. They were of equal amounts.

Int. 62. How long did those notes remain in what you call the "temporary loan," so far as the books show?

46 Ans. From Sept. 8, 1868, until Sept. 29, 1868. On the discount-sheet it is the 28th, and carried into the discount loan the 29th, on the book of Bank Balances No. 4.

Int. 63. Have you any record made at the time expressing the sale of that stock and the terms upon which the sale was made?

A. I have, sir.

Int. 64. In what form is that record—in the directors' book, corporation books, or what?

Ans. In the form of the figuring up of the account and sales on the books of the bank.

Int. 65. When you say books of the bank, do you refer to any other book than those you have at this meeting produced?

Ans. I refer to the books produced. There are other books upon which there may be entries referring to this transaction.

Int. 66. On the book produced are there any other records or entries referring to this transaction save those which you have before recited touching the notes given by the purchasers and the passage of those notes through the books of the bank?

Ans. I refer to the entries already taken and to the following: On book, Bank Balances No. 3, under date Sept. 8, 1868, is credited in temporary loan, Charles L. Hayward, $36,472.15, being principal of loan, and $2,785.01 to the credit of interest account, C. L. Hayward, making $39,257.16, and being the amount of the three notes. What I call the principal embraces the sum loaned together with the assessments which the bank has paid to the company on the Hecla stock pledged.

Int. 67. Is there any other record on the books of the bank—I do not refer to what you have called the "figuring up" of the account—which refers to the sale of that stock on the 8th of Sept., 1868?

Ans. There is no other record that I know of.

Int. 68. In your answer to the 64th interrogatory you refer to the figuring up of the account. Do you, in that, mean the paper referred to in your answer to the 25th interrogatory?

Ans. I do.

Int. 69. Is that paper a separate piece of paper, or is it a matter of record in the books of the bank?

47 Ans. It is a separate piece of paper, and also a matter of record both; i. e., the substance of it—the base of it.

Int. 70. Is it any otherwise a matter of record than as it appears in the items or entries from the books quoted in this deposition?

Ans. The paper which was handed M'r Demeritt of the detailed statement of the account, as taken from the entries on the books of the bank, was not copied verbatim.

Int. 71. The paper referred to in your last answer is the same paper referred to in your answer to the 69th interrogatory, is it?

Ans. Yes, sir.

Int. 72. By whom was that paper delivered to M'r Demeritt, if you know of your own knowledge?

Ans. By M'r Harrington, paying teller.

Int. 73. Did you see him deliver it to M'r Demeritt?

Ans. I did not.

Int. 74. Have you brought that paper here?

Ans. I have, sir.

Int. 75. Will you produce and annex it as a copy to this deposition?

Ans. I will furnish a copy to be annexed to this deposition.

(Copy produced and marked "Exhibit 6, E. T. N., Examiner.")

Int. 76. Except the paper which you have now produced in response to the last interrogatory, was any account of the sale of that stock ever rendered to M'r Hayward?

Ans. The account was rendered by M'r Demeritt, the president, personally.

Int. 77. Question repeated.

Ans. The president is competent to answer that question. I don't know whether there was or not.

Int. 78. In whose handwriting is that paper?

Ans. In the handwriting and figures of the paying teller, M'r Harrington.

Int. 79. Who keeps the record of the directors' meeting?

Ans. The cashier, as a rule. In case of sickness or absence from any cause, the records are kept by other officers of the bank.

Int. 80. As a general rule, is the cashier present at those meet-
48 ings; or does he make up the record from the statements of the president or members of the board?

(Objected to.)

Ans. As a general rule, I know all the records I make. I make them up from my own knowledge.

Int. 81. Did you aid the counsel of the bank in making the answer in this case?

Ans. I might have aided him by furnishing facts.

Int. 82. Did you not swear to the answer in this case, as an officer of the bank?

(Objected to.)

Ans. I did.

Int. 83. Have you not consulted with the counsel of the bank in respect to the defence in the case, both before and since you was subpœnaed as a witness?

(Objected to.)

Ans. I was thinking I hadn't seen M'r Ranney before I got that subpœna for a long time. I know that. I have seen him since, but in all, excepting what I have seen him in this room, I shouldn't say two minutes.

Cross-examination by A. A. Ranney, esq., of counsel for defendant:

Cross-int. 1. Are you familiar with Charles L. Hayward, the complainant's, handwriting; if so, how long have you been familiar with it, and what opportunities have you enjoyed for seeing and observing it?

Ans. I am perfectly familiar with the handwriting, having, as paying teller in the Eliot National Bank for many years, paid Hayward's checks daily, seeing and receiving deposit tickets and indorsement on checks,

and in various other ways. For many years he was a depositor at the Eliot and Eliot National Bank. I have seen him *with* his signature many times.

Cross-int. 2. State when you became cashier of the Eliot National Bank?

Ans. October 2, 1865, at 2 o'clock, precisely.

Cross-int. 3. And have remained so ever since?

Ans. And have remained so ever since.

49 Cross-int. 4. What office did you hold prior to that in the Eliot National, and the Eliot when it was a State bank?

Ans. The position of paying and receiving teller and paying teller. I carried both duties, paying and receiving teller, at first, and then paying teller.

Cross-int. 5. You say that the body of the order, marked "Exhibit 3," is in your handwriting. In whose handwriting is the signature, Charles L. Hayward?

Ans. In the handwriting of Charles L. Hayward.

Cross-int. 6. State, if you know, who signed it, if you were present?

Ans. Charles L. Hayward signed it. I carried it to him myself, and saw him sign it.

Cross-int. 7. Will you state whether, to your knowledge, the vote of the directors of August 17, 1868, referred to in your direct examination, a copy of which appears in the answer, was communicated or shown to M'r Hayward, the complainant; and, if so, by whom, and when, as near as you can state?

Ans. It was made known to him by myself and others, and right following the vote's being passed; within a day or two.

Cross-int. 8. State what you did about it.

(Objected to, except what he did with M'r Hayward personally about it.)

Ans. I went in there and notified him of the passage of such a vote by the directors, and requested that he make payment, which he said he was unable to do. Many times he was waited upon, both by the president and myself, for the purpose of getting payments, and as many times we failed to get anything, saying he was unable to pay.

Cross-int. 9. What did he say, if anything, about selling the stock, or having it sold?

Ans. I can't say that he made a special conversation with me upon that point.

Cross-int. 10. After M'r Hayward obtained the loans in question did he continue as a depositor of the bank, or cease depositing in your bank?

Ans. He ceased as a depositor.

Cross-int. 11. When the assessments on the stock were made by the Hecla Co., and became due, and before the sale referred to, who paid the assessments while the bank held the stock?

50 Ans. The Eliot National Bank paid the assessments, and hold the original receipts therefor.

Cross-int. 12. Why did the bank pay them instead of M'r Hayward?

Ans. He was waited upon in every instance, and said he was unable to pay then, and so the bank did.

Cross-int. 13. When the sale was made of the stock, as concluded on September 8, 1868, were you present on duty at the bank, or were you away; and, if away, where were you, and when did you return?

Ans. On the day of the sale of that stock and the settlement of the account I was away sick but a few days, and at my own house.

Cross-int. 14. How soon did you return after September 8, 1868?

Ans. Within a few days—a day or two—a short time.

Cross-int. 15. Were you at the bank when M'r Harrington made up the statement of M'r Hayward's account, which you have produced, dated September 8, 1868?

Ans. I was not.

Cross-int. 16. When you say that that is the statement which was handed to M'r Demeritt by M'r Harrington personally, do you mean that is the identical paper which was handed to M'r Demeritt by M'r Harrington, or don't you know?

Ans. I do not know that that is the identical paper, but it contains the figures handed M'r Demeritt.

Cross-int. 17. Do you know whether the notes of M'r Hayward were handed to M'r Demeritt for M'r Hayward, also?

Ans. I do. I handed them to him myself.

Cross-int. 18. After that time, did you know anything about a claim of there being a small balance due the bank after applying the stock sold?

(Objected to.)

Ans. I did, sir.

Cross-int. 19. What did you know of it?

(Objected to.)

Ans. That there was a difference of interest which M'r Hayward promised to pay when able.

Cross-int. 20. Do you recollect about how much that balance was?

Ans. Sixty or seventy dollars.

51 Cross-int. 21. After the sale of that stock and the transfer of it to the purchasers named, September 8, 1868, did the bank ever hold the stock or the certificate, or have any interest in it, to your knowledge?

Ans. No, sir.

Cross-int. 22. Were the notes which were given for the stock paid at the bank?

Ans. They were.

Cross-int. 23. Has the bank ever had, directly or indirectly, any of the dividends, stock, or cash, paid by the Hecla or by the Calumet and Hecla companies since the sale named?

Ans. Not one farthing, no way nor shape, directly or indirectly.

(Adjourned.)

FEBRUARY 11, 1873.

Cross-int. 24. From the time when that stock was sold, in September, 1868, down to the year 1872, did M'r Hayward ever, to your knowledge, do anything about that stock, or make any claim that the bank held it still under a pledge, or otherwise?

Ans. He did not.

Cross-int. 25. When was the first time after that that he made any claim that he had a right to redeem the stock, to your knowledge?

Ans. In a letter dated March 11, 1872, which I have in my hand.

Cross-int. 26. Did you reply to that letter; and, if so, will you produce the letter which you received, and a copy of the letter which you wrote in reply to it?

Ans. I did answer that letter on the eleventh day of March. The original letter which I received, and a copy of my reply, I now produce.

(Original letter received produced and marked "Exhibit 7, E. T. N.,

Examiner." Copy of answer produced and marked "Exhibit 8, E. T. N., Examiner."

It is admitted by counsel for complainant that the letter of M'r Hayward produced is signed by M'r Hayward, and the body of it is in the handwriting of M'r Hodges, counsel for complainant.)

(Witness continues:) My answer to the same, dated March 11, is embodied in the bill of complaint in this case.

Cross-int. 27. Had M'r Hayward, at or about the time of the
52 sale of these stocks, in September, 1868, or at any time prior and near to that time, any other collateral securities in the bank; if so, what were they, for what were they held, and what was done with them, and by what authority?

(Objected to.)

Ans. He had other collaterals for another loan in the bank prior to this. Government bonds in one instance, as collateral for loan, to which his order of Sept. 3, 1867, refers. They were sold to pay that loan by authority of order, dated Sept. 3, 1867, in writing, which I now produce.

(Order produced and copy annexed, and marked "Exhibit 9, E. T. N., Examiner.")

Cross-int. 28. Since the sale of the Hecla stock in 1868, referred to, and the payment made by the purchasers for the same, what has become on your books of the loan to Hayward? Did it afterwards continue as a loan to Hayward, or did it appear as an indebtedness in any way to the bank?

(Objected to.)

Ans. It did not continue as a loan to M'r Hayward, nor did it in any way appear as an indebtedness of M'r Hayward.

Cross-int. 29. From September 8, 1868, to March 11, 1872, did M'r Hayward ever come or offer to pay any interest on the debt or principal to the bank, or in any way, to your knowledge, recognize any existing indebtedness of his to the bank in the matter of the loan for which this stock was once held?

Ans. He did not.

Cross-int. 30. What was the matter of sixty or seventy dollars, then, which you have referred to?

Ans. That was a matter of difference in interest, which he said he would pay when able.

Cross-int. 31. Was it interest which he agreed to pay under some arrangement between you and him, or under some arrangement between him and Demeritt?

Ans. Him and Demeritt.

Cross-int. 32. When you sold for him the government bonds referred to, did they bring enough, or more than enough, to pay the debt; and if more than enough, what became of the surplus?

53 Ans. The proceeds of the bonds were in excess of the amount of loan and interest upon them, which excess was passed to the credit of the account of M'r Hayward of the other loan spoken of, and it is allowed in said account in the statement made up Sept. 8, 1868.

Cross-int. 33. After the sale of the bonds or the application of the proceeds as stated, had M'r Hayward any other indebtedness to the bank except what arose out of the loan for which the said Hecla stock was pledged?

Ans. I shall have to refer to my books to answer that question. There was no other loan than this one pending on Sept. 8, 1868.

Cross-int. 34. From Sept. 8, 1868, to March 11th, 1872, had the bank

anything to do, to your knowledge, with the surrendering of the four hundred and fifty shares in the Hecla company, the consolidation of that company with the Calumet, and the taking out of stock in the consolidated company, so far as regards the said four hundred and fifty shares pledged as stated?

Ans. They had not, sir.

Cross-int. 35. Were the said four hundred and fifty shares in the Hecla conveyed to the purchasers named, on said Sept. 8, transferred with your knowledge or consent to them?

Ans. They were transferred to them on Sept. 8, with my knowledge and consent, by the bank.

Cross-int. 36. Was it a nominal or a real sale, so far as you know?

(Objected to.)

Ans. A real sale. An absolute transfer of stock.

Cross-int. 37. Did the purchasers thereafter hold it in any way, directly or indirectly, for or in behalf of the bank?

Ans. They did not. The bank's interest ceased upon the transfer to them.

Cross-int. 38. From that time to March 11, 1872, did M'r Hayward, so far as you knew or observed, have any concern or take any interest in the consolidation of the several companies, in the surrender of the old and the issue of the new stock, or in the collection and receipt of either cash or stock dividends, so far as regards the said four hundred and fifty shares applied by the bank as aforesaid?

Ans. Not to my knowledge.

54 Cross-int. 39. Did he come to the bank, to your knowledge, and make any inquiries or keep any run of it?

Ans. No, sir.

Direct examination resumed:

Int. 84. What do you mean by the word "others" in your answer to the seventh cross-interrogatory?

Ans. M'r Demeritt and M'r Curtis, I think.

Int. 85. Any one else?

Ans. I don't recollect of any other.

Int. 86. What M'r Curtis, and what relation had he to the bank?

Ans. M'r Geo. A. Curtis, who was and is a director, and was present at the meeting when this vote was passed.

Int. 87. Did you ever hear M'r Curtis communicate to M'r Hayward that vote or the contents of that vote of August 17, 1868?

Ans. I was not present.

Int. 88. Did you ever hear M'r Demeritt communicate it to M'r Hayward?

Ans. I was not present to hear it.

Int. 89. In answer to the 8th cross-interrogatory you speak of communicating to M'r Hayward that vote. Please state where that communication took place?

Ans. At his office in Post Office avenue, at his desk, with him sitting by it.

Int. 90. Was any one present at that time but yourself and M'r Hayward?

Ans. I think there was a gentleman in the back part of the office looking at some papers, a stranger to me, in the further end of the room.

Int. 91. Near enough to have heard your communication?

Ans. I could tell the distance by measuring there, precisely. The vote of the directors was handed him in written copy, and spoken of

with him at the time of presenting, and in conversation at other times it was referred to.

(Objected to as not responsive to the question.)

Int. 92. Question repeated.

Ans. I don't know what he may have heard of the conversation.

55 Int. 93. Did you charge, in the books of the bank, to Charles L. Hayward or C. L. Hayward, the money paid as assessments upon this 450 shares of Hecla stock?

Ans. The loan of Charles L. Hayward was in the temporary loan, and to that account was charged, and placed with the papers and loan of C. L. Hayward, the various payments of assessments.

Int. 94. In answer to the 12th cross-interrogatory you say, in reference to this payment of assessments by the bank, that "he, M'r Hayward, was waited upon in every instance, and said he was unable to pay them, and so the bank did." Did you personally wait upon him in every instance?

Ans. Yes, sir, and many times additional.

Int. 95. Have you any personal recollection of calling upon M'r Hayward to pay the assessments laid by the Hecla Company, which the bank ultimately paid July 23, 1867?

Ans. I can't particularize every instance that I waited upon him in connection with these assessments. I did it, as a rule, in every instance, and at other times, but I would not undertake now to fix the particular days from recollection.

Int. 96. Will you swear that you personally waited upon M'r Hayward in reference to each one of the assessments paid by the bank upon these 450 shares of Hecla stock, and in substance requested him to pay them?

Ans. Yes, sir; at some time or other he has been requested to pay all these assessments by me and repeatedly.

Int. 97. I do not ask whether you have demanded of him to pay all these assessments, but whether you will swear that you personally requested of him to pay each one of those assessments before it was paid by the bank.

Ans. Yes, sir. He has had an opportunity to pay each and all of them.

Int. 98. (Objected to as in no wise responsive to the question, and as voluntary on the part of the witness.)

Int. 99. In the 16th cross interrogatory you are interrogated whether the paper handed to M'r Demeritt by M'r Harrington was an original or the identical paper, and you replied that you do not know that that is the identical paper, but it contains the figures handed M'r De-

56 meritt. Did you compare those figures and see the paper handed to M'r Demeritt by M'r Harrington?

Ans. I did not see M'r Harrington hand the paper to M'r Demeritt, as I was absent from the bank and sick on that day, but on inquiring of M'r Harrington as to the settlement of the account, he handed me this paper.

Int. 100. Referring to your answer to the 17th cross-interrogatory, when did you hand M'r Hayward's notes to M'r Demeritt?

Ans. Well, I can't fix a date. I can only swear that I handed them to M'r Demeritt.

Int. 101. After September 8th, 1868?

Ans. Yes, sir.

Int. 102. Can you tell at what time you returned to your duties in

the bank after the illness which occasioned your absence September 8, 1868?

Ans. My impression is within a day or two, but I can tell it exactly by referring to my books. It might have been a week; I can't tell. If it is important I will ascertain the fact.

Int. 103. When did you discover that there was the difference of interest referred to in your answer to the 19th cross-interrogatory?

Ans. Upon looking over the account—this difference of interest was the difference between 6 and 7 per cent.—after crediting the excess on the bond loan, and was apparent to me at that time.

Int. 104. Question repeated.

Ans. At such time as I returned to the bank and saw the account. After the sickness referred to, and immediately following the settlement.

Int. 105. Did you know of that difference when you handed the notes to M'r Demeritt?

Ans. Yes, sir.

Int. 106. Referring to this same answer, did M'r Hayward ever promise you personally to pay that difference?

Ans. Verbally, yes.

Int. 107. Where?

Ans. I couldn't undertake to say where, but in conversation which I had with him subsequent to the settlement.

Int. 108. In your answer to the twentieth direct interrogatory you
57 say "by his stating the fact and having the entries accordingly made in the book." Did you have those entries made, or make them yourself under M'r Demeritt's direction?

Ans. I had them made by the officers under whose particular department they came.

Int. 109. In answer to the twenty-seventh cross-interrogatory, you say, "M'r Hayward had in the bank other collateral for another loan." When was that loan made?

Ans. I shall be obliged to refer to my books to give you the exact date.

Int. 110. Were you present when the certificates for the four hundred and fifty shares of Hecla stock were delivered to the purchasers?

Ans. No, sir.

Int. 111. Did you ever see the certificates of stock that were issued to the purchasers in place of the four hundred and fifty shares sold by the bank?

Ans. No, sir; never saw them.

Int. 112. Will you examine, and before closing this deposition state when you left the bank and when you returned to it, on the occasion of your illness, before spoken of?

Ans. I will, sir, and report.

Cross-examination resumed:

Cross-int. 40. Will you also look at your books and make a detailed and complete statement of the account of the loan or loans made to M'r Hayward by the bank, for which the four hundred and fifty shares were pledged, and the subsequent receipts and payments in relation to the same, and the account as it was made up for settlement and stood on your books on the 8th of Sept., 1868, including the payments made for assessments, and produce the receipts for assessments paid by the bank while they held the stock?

Ans. I will, sir.

Cross int. 41. You say you were not present when M'r Demeritt or

M'r Curtis made the communication to M'r Hayward referred to. Will you state whether the fact was reported officially to you by them, or to the board thereafter, to your knowledge, the fact of your having done so?

58 (Objected to.)

Ans. Reported officially by M'r Demeritt, and, in conversation in the directors' room, by M'r Curtis.

Cross-int. 42. You say you can't fix the date when you gave the notes of M'r Hayward to M'r Demeritt. Will you please state as near as you can in reference to Sept. 8, 1868, or when you returned from your sickness?

Ans. It was some time after that; more than one, two or three months. There may be something in the bank that will enable me to answer more clearly, and I will look and see.

(Adjourned.)

FEBRUARY 28, 1873.

Witness states that he wishes to correct the answer to interrogatory 108. In the place of the letter "I," I would substitute the words "M'r Demeritt, probably."

Witness states that he left the bank on the 5th of September, 1868, and returned on the 10th of the same month.

Witness states that he is ready to answer now cross-interrogatory 40.

Answers: I produce the account or statement called for. (Account produced and marked "Exhibit 10, E. T. N., Ex'r.") I also produce the receipts for assessments paid by the bank, five in number. (Receipts produced and marked for identification "Exhibit 11, E. T. N., Ex'r.")

Direct examination resumed:

Int. 113. Will you show me upon the book the original entry of the item entered in Exhibit 10, in these words, "Int. @ 1 per cent., as above"?

Ans. There is no entry of that on the books, if I understand the question.

Int. 114. Do you not understand the question and the item pointed out to you, and referred to?

Ans. Well, I think I do now.

Int. 115. Where did you obtain that item?

Ans. From the interest account, it being the difference between 6 and 7 per cent.

Int. 116. Will you point the interest account from which that was made on your book?

59 Ans. Yes, sir.

(Witness points out an item.)

Int. 117. In the item you point out, the only words referred to are C. L. Hayward, 278,501, in book, Bank Balances No. 3, September 8th, are they not?

Ans. They are under the head of interest account credit.

Int. 118. Those words seem to be interlined; will you explain that appearance?

Ans. There is nothing unusual in that entry. I don't call it interlined. Where several items come in groups they are carried in short, and amount total extended.

Int. 119. I do not see in that item any explanation of, or reference to, the item entered in Exhibit 10, and inquired of in interrogatory 118. Will you explain?

Ans. I will demonstrate it in figures. The one per cent., $464.16, is derived from the sum of $2,785.01, which is 6 per cent.

Int. 120. The sum $464.16, above named, does not, then, anywhere appear upon the books of the bank in those figures, does it?

Ans. It does not appear precisely in those figures, but it is disposed of in other entries, in a measure; there are other entries upon the book which bear upon that.

Int. 121. Please to show any item in your books in which those figures appear.

Ans. I can't show the precise figures.

Int. 122. Does that item appear in any account you rendered to M'r Hayward?

Ans. I can't say that it does or does not, not rendering the account.

Int. 123. Does it appear in the account marked "Exhibit 6," heretofore rendered?

Ans. It does not.

Int. 124. When was your attention first directed to that item of $464.16, or to the difference of interest between 6 and 7 per cent.?

Ans. Well, immediately upon seeing the account on my return to the bank, on or about the 10th of September.

Int. 125. Will you look at your book and show the items indicating the time when the notes of Mess'r's Goodwin, White, and Robin-
60 son were paid, and how they were paid, whether by giving other notes or by payments in cash?

Ans. (Witness looks at books, and answers:) The check discount, the paying-teller's daily cash-book, and what we call the long discount, and one or two other books, show the payment to have been made the day they were due, but whether in cash or temporary loans I cannot precisely say now, but can state explicitly by referring to the books of the bank, and will do so.

Int. 126. The paper, of which Exhibit 6 is a copy, was kept with any other paper referring to the M'r Hayward's loan, or to the Hecla stock, or was it kept by itself?

Ans. I think it was kept with the papers referring to this matter.

Int. 127. What papers?

Ans. It was kept with the papers of the bank, probably with the minutes of his loan, and the assessment papers.

Int. 128. What minutes of the loan were made beside the notes, and what minutes do you refer to in your last answer?

Ans. The original minutes of his loans from time to time, kept in the temporary-loan package.

Int. 129. Were his notes given for the loans secured by the Hecla stock kept in the same package?

Ans. I think so; or a part of the time, at least.

Int. 130. When did you last see those notes?

Ans. I couldn't tell.

Int. 131. Tell us as nearly as you can.

Ans. I would gladly fix a date if I was competent to, and have looked over records to see if I could establish any particular time, and am not clear enough to state a time.

Int. 132. Have you seen them since last Christmas?

Ans. Oh, no.

Int. 133. Have you seen them since the last 4th of July?

Ans. I don't know. I couldn't say.

Int. 134. Have you not had those notes in your hands since you

received the letter from M'r Hayward dated the 11th of March, 1872, and that is among the exhibits, marked 7, and now shown you?

Ans. I won't undertake to say.

61 Int. 135. Will you swear, sir, that you do not remember having those notes in your possession since this suit was commenced?

Ans. I will state that I don't remember; which is the fact.

Int. 136. To whom did you give those notes when you last had them?

Ans. To John Demeritt, president of the Eliot Bank at that time.

Int. 137. At whose suggestion did you give them to him?

Ans. Well, if anybody's at his own. I am not quite certain about that.

Int. 138. Will you search your recollection and answer whether you did or did not give him those notes after the suit was begun, and in view of such suit?

Ans. I have tried very hard and earnestly to recollect, but I am not competent to recollect.

Int. 139. Was there any account upon your books in which there were items charging M'r Hayward with these loans on Hecla stock, and with the sums paid by the bank for assessments?

Ans. Yes, sir.

Int. 140. Will you produce the book and items?

Ans. Yes, sir. I now produce the book, Bank Balances No. 3, showing a portion of the entries. There are other books in the bank showing showing entries bearing upon this.

Int. 141. Will you point out on book, Bank Balances No. 3, any items that indicate any credit to M'r Hayward, and read the item, that the examiner may make it verbatim?

Ans. Under date of Tuesday, Sept. 8th, 1868, there is credited to Charles L. Hayward, in temporary-loan account, $36,472.15; also, under the same date, Charles L. Hayward, interest account, $2,785.01.

Int. 142. There seems to be an erasure under the figures $36,472.15; can you explain it? And is there not such an erasure?

Ans. It was probably a clerical error—some blot, or something of that kind. There are other erasures on the same page. There are several of them on the page, I should think, that had been erased. The paper has been scratched in several places; probably a clerical error. There is no reason for doing that, and there is nothing unusual in it.

Int. 143. In whose handwriting is that item?

Ans. I should say, M'r Osborn, our first bookkeeper.

62 Int. 144. Is there any other place than that in which there is a credit to M'r Hayward of that sum; *i. e.*, does it appear in any other place to his credit on your books? If so, where?

Ans. There is no other credit of this precise item; but, at the time the loans were made, the credits appear to him in a book, not here.

Int. 145. You mean, by your last answer, that the money loaned him was entered to his credit in your books to be drawn against, do you not?

Ans. Yes, sir.

Int. 146. In answer to interrogatory 141, you say "there is credited to Charles L. Hayward, in temporary-loan account," these sums. Is there any other indication that these sums are credited to M'r Hayward than that those figures appear in the column headed at the top deposits?

Ans. No, sir; that is the ordinary way of treating a credit in all of our accounts under the head of deposits.

Int. 147. In answer to the 35th cross-interrogatory, you say "they"—the 450 shares—"were transferred to them on the 8th of September, with

my knowledge and consent, by the bank." If you were absent from the bank from the 5th to the 10th of September, how were they transferred on the 8th of September with your knowledge and consent?

Ans. When I answered that question, I answered it as cashier of the bank. The bank had the power to transfer, or the president, rather, and I thought it was a competent answer to the question because the bank was represented.

Int. 148. How do you know the bank was represented, if you were absent from it five or six days at that time?

Ans. On the principle that the president or the cashier are competent to represent the bank, and both never leaving it at the same time.

Int. 149. How do you know the president was there that day, if you was absent?

Ans. Because business was transacted and checks were signed, and things were done which couldn't have been done unless he was there to do it.

Int. 150. Have you answered all the questions that have been propounded to you in this examination as cashier of the bank, or as a witness bound by his oath to answer only what he knows, and not merely what he supposes to be the truth?

63 Ans. I have answered all the questions asked me in truth, and according to the best of my knowledge and belief and honest conviction.

Int. 151. As truly as you answered that question in which you state that the shares were transferred by the bank on the 8th of September, 1868, with your knowledge and consent, when you was absent from the bank five days, including that time?

(Objected to as leading, incompetent, and impertinent, in the popular sense.)

Ans. I have answered the testimony given here in accordance with my best knowledge and belief and honest conviction. If I have made a mistake, it is a mistake, with no intent to misrepresent.

Int. 152. Please look at the book called "Directors' Records," and state whose handwriting is the entry of the record of September 7, 1868, if you know.

Ans. That is a record of my own handwriting, made probably after returning to the bank, made from the minutes of whoever was present.

Int. 153. Does there appear to have been any meeting of the directors on the 8th of September, 1868, by those records?

Ans. There does not, sir. Our regular meetings are Mondays and Thursdays.

Int. 154. Will you prepare a copy of the record of September 7, 1868, and present it to the examiner, to be filed as an exhibit?

Ans. I will, sir.

Int. 155. Is there any entry in the books of the bank in which the sale of this stock to Mess'rs Goodwin, Robinson, and White is in terms expressed as a sale to them of this stock?

Ans. No, sir; nothing further than the figures and records of the gentleman's notes and payment of the same.

Int. 156. The stock is not mentioned in those entries, is it?

Ans. No.

Int. 157. You were not present when the bargain was made to sell this stock to Mess'rs Goodwin, White, and Robinson, were you?

Ans. No, sir.

Cross-examination resumed:

Cross-int. 43. Will you please state whether, after you returned to the

bank, Sept. 10, 1868, you were informed or learned of the sale and transfer of the Hecla stock to Mess'rs Robinson, Goodwin, and White; and, if so, whether you then approved of and sanctioned the same?

64 Ans. I did learn of it upon my return to the bank and approved of the same.

Cross-int. 44. You have been asked in regard to the entry in book of daily balances of $36,472.15; state whether you on your return knew of that entry as it now appears.

Ans. Yes, sir.

Cross-int. 45. How often was that book balanced?

Ans. Daily, and accounts proved daily.

Cross-int. 46. State whether the book balanced correctly that day with that entry as it is.

Ans. Yes, sir.

Cross-int. 47. In your call or demand loan account in the bank with individuals, how much of an account did you keep with each individual? State the system of accounts in that respect.

Ans. The precise manner of the account was this: the memorandum or notes with collaterals were placed in an ordinary note-wrapper, on the outside headed the name of the party to the loan; that entry was credited to his account, the amount entered on this wrapper, and as payments were made a simple deduction of the amount paid, or, if additional loans made, the amount added on the wrapper. These several loans were kept in a package, upon the outside or top of which was placed a blank slip of paper, with a list of the figures or amounts of the various loans, and footed, adding to or deducting, as the case might be, the payments or additional loans, the footing proving each day upon the temporary loan account as kept in the book of bank balances; that was the proof of the accounts between the cashier and bookkeeper.

Cross-int. 48. Then did you enter on the books of the bank at all or name in them the securities for the loan?

Ans. I entered upon the books of the bank the simple figures denoting the amount of money.

Cross-int. 49. So, then, the books would not show either the receipt of the collateral or the disposal of them by the bank, whether they were taken up by the depositor, or sold to other parties?

Ans. They would not. They simply show the figures denoting money.

Cross-int. 50. Was the loan account of M'r Hayward kept on and carried through the books, from its commencement to its conclu-

65 sion, in the same manner or way that other accounts of the same kind are kept and carried?

Ans. Yes, sir: treated in the same manner, in the same system, that all other loans of the same kind are kept.

Cross-int. 51. Has the bank ever undertaken to keep in the call-loan or discount account a regular account, journal, or even a ledger account with each individual?

Ans. We keep no individual ledger accounts in detail, nor have we for ten or twelve years. Originally we did, but improvement in books has obviated the necessity of keeping a ledger account with individuals.

Cross-int. 52. In the case of a call loan with collateral security, where you keep a slip of paper or the wrapper, as you have stated, do you put upon the paper which is in the wrapper a statement of the collaterals?

Ans. Upon the wrappers enclosing the collaterals I do, a brief minute.

Cross-int. 53. But that statement you don't carry into or enter upon your books?

Ans. No, sir.

Cross-int. 54. In the case of the alleged erasure or abrasion of the paper, is there anything in the books indicating that after the day when the entry referred to was made there was any change of the figures or readjustment of any balances in the book, in view of any change made in the item referred to?

Ans. There is not; and it would be impossible, as the balancing of the book on that day calls for those precise figures, and no others would balance it. That fixes those figures beyond question.

(Adjourned.)

WEDNESDAY, *March* 12, 1873.

Witness, Conant, produces copies of the receipts for assessments paid by the bank (produced and marked "Exhibit 13, E. T. N., Examiner"). Also, copy of record of directors' meeting of September 7, 1868 (produced and marked "Exhibit 14, E. T. N., Examiner").

All being copies of original papers produced at this examination.

R. B. CONANT.

66 *Deposition of William H. Goodwin.*

FEBRUARY 17, 1873.

Direct examination by E. F. Hodges, esq., of counsel for complainant:

Int. 1. Are you acquainted with the handwriting of John Demeritt?

Ans. I am, pretty well.

Int. 2. Will you please look at the certificate-book of the Hecla Mining Company, certificates twenty-four and twenty-five, returned and pasted therein, one for one hundred and one for three hundred and fifty shares of said stock, and state in whose handwriting the words "John Demeritt, pres't," on the back of each of said certificates, is?

Ans. I think it's John Demeritt's.

Int. 3. Do you know the handwriting of E. P. Adams?

Ans. I do

Int. 4. Please look at the transfer-book of the Hecla Mining Company, transfers two hundred and sixty-five, two hundred and sixty-six, and two hundred and sixty-seven, dated Sept. 8, 1868, referring to old certificates numbers twenty-four and twenty-five, and state in whose handwriting the words "John Demeritt, pres't, for R. B. Conant, cashier, E. P. Adams, attorney," as written under each of the said transfers number two hundred and sixty-five, two hundred and sixty-six, and two hundred and sixty-seven, is.

Ans. I think they are written by E. P. Adams.

Int. 5. Who is E. P. Adams?

Ans. He is the discount clerk in the Eliot National Bank.

WM H. GOODWIN.

Deposition of Charles W. Seabury.

FEBRUARY 17, 1873.

Direct examination by E. F. Hodges, esq., of counsel for complainant:

Int. 1. What is your name, age, residence, and occupation?

Ans. Charles W. Seabury; forty-two; Boston; secretary and treasurer of the Calumet and Hecla Mining Company.

Int. 2. How long have you been secretary of the said company?

Ans. Since September 1st, or October 1st, 1857.

67 Int. 3. Will you examine the books and papers of said company, and state what you find touching the transfer of one hundred and of three hundred and fifty shares of the Hecla Mining Company in October, 1866, from Charles L. Hayward to R. B. Conant, cashier?

Ans. I find that October 17, 1866, on transfer No. 29 of the transfer-book of the company, Charles L. Hayward, through George W. West, attorney, transfers 100 shares of the stock of the Hecla Mining Company to R. B. Conant, cashier. On the 10th of October, 1866, transfer No. 32 of the same book, Charles L. Hayward, by a power of attorney, blank name, transfer made by Alexander Agassiz, who was secretary and treasurer at the time, transfers 350 shares. This stock of Hayward's stood to his credit on the stock ledger, but no certificates had been issued to him. I present the original powers of attorney on which the transfers were made. The certificate No. 24 was issued to Conant for 100 shares, and No. 25 for 350 shares.

Int. 4. Will you examine the books of the company and papers, and produce any transfer of the certificates named in your last answer to any other parties, together with the original certificates, if they have been returned to you, turning first to the original certificates?

Ans. I find that certificate No. 24 was surrendered, transfer on the back of it not dated. I have no means of knowing the date of that transfer except by referring to the transfer-book. No. 25 is the same. The power of attorney on the back of each of these certificates is signed, John Demeritt, president.

Int. 5. Do you know the handwriting of M'r Demeritt?

Ans. I think I do.

Int. 6. Whose handwriting are those powers of attorney signed in, to the best of your judgment?

Ans. I should think they were in M'r Demeritt's.

Int. 7. Will you furnish to the examiner copies of those certificates with the powers on the back, that he may annex them to your deposition in this case?

Ans. I will.

Int. 8. Please turn to your transfer-book and find, if it appears thereon, the transfers of these shares.

Ans. I find on the transfer-book of the company transfer No. 265, September 8, 1868, a transfer of 150 shares of this stock, being

68 part of old certificate No. 25, transferred to William H. Goodwin, of Boston, transfer signed John Demeritt, president, per R. B. Conant, cashier, E. P. Adams, attorney. Transfer No. 266, 150 shares, part of old certificate 25, same date, September 8, 1868, transferred to Joseph H. White, of Boston, signatures same as the other. Transfer No. 267, 150 shares, balance of 25 and old certificate 24, same date, September 8, 1868, to John P. Robinson, of Boston, signatures same as the others. William H. Goodwin received certificate No. 263 for 150 shares, Joseph H. White received No. 264 for the same number of shares, John P. Robinson received certificate No. 265 for the same number.

Int. 9. In whose handwriting is the signature to those transfers on your book, if you know?

Ans. I don't know.

Int. 10. Do you find upon your certificate-book any transfer from the parties named in your last answer, of the shares thus transferred to them?

Ans. No transfers of the stock.

Int. 11. Do you know what has become of the certificates thus issued to Mess'rs White, Robinson, and Goodwin?

Ans. That question I am not prepared to answer without looking it up. My impression is, that they were surrendered at the time of the consolidation, May 1, 1871; the consolidation of the Calumet Co., Hecla Co., Scott Co., and Portland Co., under the title of the Calumet and Hecla Mining Co., May 1, 1871. All of the old certificates were called in, and certificates in the new company issued in their stead.

Int. 12. If these shares were then surrendered, how many shares of the consolidated company, called the Calumet and Hecla, would have been issued in their stead?

Ans. The same number, 450.

Int. 13. Since those shares were issued, Sept. 8, 1868, can you now state how many dividends in cash have been declared by the Hecla Co., and by the Calumet and Hecla Co. thereon, and the amount of each dividend?

Ans. I cannot. I couldn't do it without reference to my books.

Int. 14. Will you refer to your books and hand to the examiner
69 a list of those dividends, and their dates and amounts, and when and to whom paid, and upon what stock?

Ans. I will.

Int. 15. Can you now tell what, if any, dividends have been made in stock by said company or companies to which the holders of the above-named certificates would be entitled, and when such dividends were declared, and the persons to whom the stock was issued?

Ans. I cannot, without reference to the books. I will furnish a list, upon examining my books.

Int. 16. Will you also hand to the examiner copies of the transfers in the book you have just read from, transferring said shares from R. B. Conant, cashier, to Mess'rs Robinson, White & Goodwin?

Ans. I will.

Cross-examination by A. A. Ranney, esq., of counsel for defendant:

Cross-int. 1. Will you state whether that, on the 8th of September, 1868, certificates of stock in the Hecla Company, to the amount in all of four hundred and fifty shares, were issued by the company, and delivered, one hundred and fifty shares each to J. P. Robinson, W'm H. Goodwin and Joseph H. White?

Ans. I can't answer that question. I couldn't, without referring to the books of the office.

Cross-int. 2. Will you refer to your book and then answer the last question?

Ans. I will.

Cross-int. 3. Will you state, if you can, without referring to your books, and if you cannot, refer to your books, and then state, what, if any, assessments were laid by the Hecla Company upon the four hundred and fifty shares transferred by M'r Hayward to the cashier of the bank at the time stated; and, if paid, when they were paid, and by whom paid, up to the 8th of September, 1868?

Ans. I find that assessment No. 2, of $3.00 per share, was payable March 11, 1867; No. 3, of $5.00 per share, July 1, 1867; No. 4, of $5.00 per share, September 21, 1867; No. 5, of $3.00 per share, Nov. 21, 1867; No. 6, of $4.00 per share, January 21, 1868. That completed the capital stock, $22.00, all told. These were the dates when they were payable; but when they were paid, or by whom, I cannot state.

70 Cross-int. 4. Prior to this transfer by M'r Hayward to the bank,

what amount had been paid on or for the said four hundred and fifty shares to the company in all?

Ans. There had been one assessment called of $3.00 per share; added to the $22.00, made the $25.00, the entire capital stock.

Cross-int. 5. What was the par value of the stock of the Hecla Company?

Ans. Twenty-five dollars. Twenty thousand shares at twenty-five dollars per share, making $500,000.

Cross-int. 6. And so far as you know, was the stock paid in by these assessments, and entirely so?

Ans. It was.

Cross-int. 7. Do you know of any other capital stock that was paid in, except what was paid in on the assessments which were made on the capital stock?

Ans. I do do not.

(Adjourned.)

MARCH 14, 1873.

Witness, Seabury, appears and produces copies of cash dividends of the Hecla Mining Company from its organization to date of consolidation; also copies of cash dividends and stock issues of the Calumet & Hecla Mining Company, from its organization to this date (marked "Exhibit No. 15, E. T. N., Ex'r"); also copies of powers of attorney of Charles L. Hayward, for the transfer of four hundred and fifty shares of stock of the Hecla Mining Company to R. B. Conant, cashier (produced and marked "Exhibit 16, E. T. N., Ex'r"); also copy of certificate number twenty-four, of the Hecla Mining Company, for one hundred shares of stock in the name of R. B. Conant, cashier (produced and marked "Exhibit 17, E. T. N., Ex'r"); also copy of certificate number twenty-eight, of the Hecla Mining Company, for three hundred and fifty shares in the name of R. B. Conant, cashier (produced and marked "Exhibit 18, E. T. N., Ex'r"); also copies of transfers number two hundred and sixty-five, two hundred and six'-six and two hundred and sixty-seven, of the Hecla Mining Company, showing transfers of four hundred and fifty shares of stock in the name of R. B. Conant, cashier, to W'm H. Goodwin, Joseph H. White, and John P. Robinson, one hundred and fifty shares each (produced and marked "Exhibit 19, E. T. N., Ex'r").

CHARLES W. SEABURY.

71 *Deposition of Charles L. Hayward.*

MARCH 21st, 1873.

Direct examination by E. F. Hodges, esq., of counsel for complainant:

Int. 1. What is your name, age, residence, and occupation?

Ans. Charles L. Hayward; age, 61 to-morrow; reside in Boston Highlands; occupation, stock-broker.

Int. 2. Are you the complainant in this case?

Ans. Yes, sir.

Int. 3. If, in the autumn of 1866, you pledged to the Eliot National Bank any Hecla mining stock for a loan or loans, please state the number of shares so pledged, when, and for what amount, as nearly as your memory serves.

Ans. October 17, one hundred shares, $6,500; October 19, three hundred and fifty shares, $20,000.

Int. 4. Do you mean that you pledged on the 17th of October, one hundred shares of that stock for a loan of $6,500, and on the 19th of October, three hundred and fifty shares, for a loan of $20,000?

Ans. I do, sir.

Int. 5. Will you please look at the paper now presented you, and marked Exhibit 3, and state in whose handwriting the body of said paper is written, if you know, and by whom the signature is written?

(Exhibit 3 shown witness.)

Ans. The body of it by M'r Conant, cashier; the signature by myself.

Int. 6. Please state if you ever gave to the bank or its officers any other written authority to sell said stock than what is contained in that paper referred to in your last answer?

Ans. Never.

Int. 7. Will you look at the paper now shown you, dated August 18, 1868, and state if you ever received that paper, and when and by whom it was presented to you?

Ans. This paper I received, but by whom I can't say.

Int. 8. When?

Ans. At the date of it.

(Paper put in evidence and marked "Exhibit 20, E. T. N., Ex'r.")

72 Int. 9. Except that paper, did you ever receive from the bank or its officers any written notice of an intention to sell your stock?

Ans. Never.

Int. 10. Did you ever receive from the bank or its officers, any of them, any oral notice of an intention to sell your Hecla stock, or of any time or any place of sale?

Ans. Never.

Int. 11. Please look at paper marked Exhibit 6 and state if you ever received a paper of which that is a copy, or a substantial copy; and if yea, state when you received it and from whose hands.

Ans. I received a copy of this about the 8th of September, from whose hands I can't recollect, but it was probably one of the officers of the bank.

(Question and answer objected to by counsel for defendant unless the witness produces the paper which he received.)

Int. 12. Where were you when you received that paper?

Ans. At my office, No. 1 Post Office avenue.

Int. 13. When that paper was given you, did the person who presented it make any statement concerning the sale of your Hecla stock; and if yea, what statement?

(Objected to by defendant's counsel.)

(Question withdrawn.)

Int. 14. Since the 12th of August, 1868, the time when the note before referred to was presented to you, have you at any time to any officer of the bank assented to any pretended sale of your said Hecla stock?

(Objected to for form and substance.)

Ans. Never.

Int. 15. After the 8th of September, 1868, or after the receipt of the paper Exhibit 6, did you do anything in reference to that stock until the autumn of 1871?

Ans. No, sir.

Int. 16. What was your condition in pecuniary matters from August, 1868, for three or four years; embarrassed or otherwise?

Ans. Embarrassed, sir.

Int. 17. Did you continue business from September, 1868, onward for some time, and how long?

73 (Objected to.)

Ans. Six or eight months.

Int. 18. What did you then do?

(Objected to.)

Ans. Left my office and retired to my home.

Int. 19. Did you do any business in town from that time forward, and when, if ever, did you resume your business in the street as a broker?

(Objected to.)

Ans. I resumed business as a broker January, 1872.

Int. 20. Between June, 1872, and the time when you retired to your home, as you say, during that period did you do business in town?

(Objected to.)

Ans. I don't understand the question.

Int. 21. You say you retired to your home six or eight months after September 8, 1868, and did no business. Where did you remain and what did you do from that time until January, 1872?

(Objected to.)

Ans. I remained at home and worked upon my place.

Int. 22. Did you come into State street during that time, and how frequently, if at all?

Ans. Not at all.

Int. 23. Did you ever hear from any officer of the bank, and what officer, if any, that the directors of the bank had purchased your Hecla stock, and when did you so hear, if at all?

(Objected to.)

Ans. It was in the fall of 1871. I met M'r Demeritt at the door of the Tremont National Bank on State street; he passed me and bid me "good morning," and says, "Hayward, what a fool you was to sell your Hecla stock. The directors of the bank took it." He stopped, of course, and passed on after he had spoken to me; he made that statement at the same time.

(Answer objected to by counsel for defendant.)

Int. 24. Had you previously to that time, any knowledge or any suspicion that any director of the bank had pretended to purchase that stock?

(Objected to for form and substance.)

Ans. Never.

74 Int. 25. Had you ever before heard any suggestion of a negotiation on the part of the bank to sell that stock to any directors?

Ans. Never.

Int. 26. When, if ever, did you first hear that there was a sale, or a pretended sale, of that stock made by the bank to Mess'rs Goodwin, White, Weld, and Robinson?

Ans. A short time since.

Int. 27. Did you ever hear of it until the answer of the respondent was shown to you in this cause?

Ans. Never.

Int. 28. Looking back to the autumn of 1868, please state whether you had any conversation with the cashier of the bank concerning that sale, or in any way manifested satisfaction that said stock had been sold?

(Objected to for form and substance.)

Ans. No.

(Counsel for complainant introduces in evidence a paper marked "Exhibit 21, E. T. N. Ex'r.)

Int. 4. Do you mean that you pledged on the 17th of October, one hundred shares of that stock for a loan of $6,500, and on the 19th of October, three hundred and fifty shares, for a loan of $20,000?

Ans. I do, sir.

Int. 5. Will you please look at the paper now presented you, and marked Exhibit 3, and state in whose handwriting the body of said paper is written, if you know, and by whom the signature is written?

(Exhibit 3 shown witness.)

Ans. The body of it by M'r Conant, cashier; the signature by myself.

Int. 6. Please state if you ever gave to the bank or its officers any other written authority to sell said stock than what is contained in that paper referred to in your last answer?

Ans. Never.

Int. 7. Will you look at the paper now shown you, dated August 18, 1868, and state if you ever received that paper, and when and by whom it was presented to you?

Ans. This paper I received, but by whom I can't say.

Int. 8. When?

Ans. At the date of it.

(Paper put in evidence and marked "Exhibit 20, E.T.N., Ex'r.")

72 Int. 9. Except that paper, did you ever receive from the bank or its officers any written notice of an intention to sell your stock?

Ans. Never.

Int. 10. Did you ever receive from the bank or its officers, any of them, any oral notice of an intention to sell your Hecla stock, or of any time or any place of sale?

Ans. Never.

Int. 11. Please look at paper marked Exhibit 6 and state if you ever received a paper of which that is a copy, or a substantial copy; and if yea, state when you received it and from whose hands.

Ans. I received a copy of this about the 8th of September, from whose hands I can't recollect, but it was probably one of the officers of the bank.

(Question and answer objected to by counsel for defendant unless the witness produces the paper which he received.)

Int. 12. Where were you when you received that paper?

Ans. At my office, No. 1 Post Office avenue.

Int. 13. When that paper was given you, did the person who presented it make any statement concerning the sale of your Hecla stock; and if yea, what statement?

(Objected to by defendant's counsel.)

(Question withdrawn.)

Int. 14. Since the 12th of August, 1868, the time when the note before referred to was presented to you, have you at any time to any officer of the bank assented to any pretended sale of your said Hecla stock?

(Objected to for form and substance.)

Ans. Never.

Int. 15. After the 8th of September, 1868, or after the receipt of the paper Exhibit 6, did you do anything in reference to that stock until the autumn of 1871?

Ans. No, sir.

Int. 16. What was your condition in pecuniary matters from August, 1868, for three or four years; embarrassed or otherwise?

Ans. Embarrassed, sir.

Int. 17. Did you continue business from September, 1868, onward for some time, and how long?

73 (Objected to.)

Ans. Six or eight months.

Int. 18. What did you then do?

(Objected to.)

Ans. Left my office and retired to my home.

Int. 19. Did you do any business in town from that time forward, and when, if ever, did you resume your business in the street as a broker?

(Objected to.)

Ans. I resumed business as a broker January, 1872.

Int. 20. Between June, 1872, and the time when you retired to your home, as you say, during that period did you do business in town?

(Objected to.)

Ans. I don't understand the question.

Int. 21. You say you retired to your home six or eight months after September 8, 1868, and did no business. Where did you remain and what did you do from that time until January, 1872?

(Objected to.)

Ans. I remained at home and worked upon my place.

Int. 22. Did you come into State street during that time, and how frequently, if at all?

Ans. Not at all.

Int. 23. Did you ever hear from any officer of the bank, and what officer, if any, that the directors of the bank had purchased your Hecla stock, and when did you so hear, if at all?

(Objected to.)

Ans. It was in the fall of 1871. I met M'r Demeritt at the door of the Tremont National Bank on State street; he passed me and bid me "good morning," and says, "Hayward, what a fool you was to sell your Hecla stock. The directors of the bank took it." He stopped, of course, and passed on after he had spoken to me; he made that statement at the same time.

(Answer objected to by counsel for defendant.)

Int. 24. Had you previously to that time, any knowledge or any suspicion that any director of the bank had pretended to purchase that stock?

(Objected to for form and substance.)

Ans. Never.

74 Int. 25. Had you ever before heard any suggestion of a negotiation on the part of the bank to sell that stock to any directors?

Ans. Never.

Int. 26. When, if ever, did you first hear that there was a sale, or a pretended sale, of that stock made by the bank to Mess'rs Goodwin, White, Weld, and Robinson?

Ans. A short time since.

Int. 27. Did you ever hear of it until the answer of the respondent was shown to you in this cause?

Ans. Never.

Int. 28. Looking back to the autumn of 1868, please state whether you had any conversation with the cashier of the bank concerning that sale, or in any way manifested satisfaction that said stock had been sold?

(Objected to for form and substance.)

Ans. No.

(Counsel for complainant introduces in evidence a paper marked "Exhibit 21, E. T. N.. Ex'r.)

Int. 29. Please look at the paper now shown you, marked Exhibit 21, and state if that is or is not, the paper referred to in your answer to interrogatory 11, as being substantially copied in Exhibit 6.

(Objected to for form and substance.)

Ans. It is the paper.

Int. 30. State, if you know, in whose handwriting that paper, Exhibit 21, is written.

Ans. Very well indeed—by M'r Harrington, former bookkeeper.

Int. 31. Please state whether you have or have not at any time received any communication in writing from the bank touching the sale of your stock, except the paper, Exhibit 20, now shown you.

Ans. No, sir.

Cross-examination by A. A. Ranney, esq., of counsel for defendant:

Cross-int. 1. For how long a time did you originally borrow the money of the bank?

Ans. No time stated.

Cross-int. 2. Was it not a demand loan?

Ans. It was.

75 Cross-int. 3. With whom, personally, did you deal in making the loan?

Ans. M'r Demeritt, the president.

Cross-int. 4. What did you say to him when you negotiated it?

Ans. That I wanted the money.

Cross-int. 5. How long did you say you wanted it?

Ans. No time stated.

Cross-int. 6. What did you say about the stock?

Ans. It was good.

Cross-int. 7. What else did you say?

Ans. Nothing, to my recollection.

Cross-int. 8. Had a man agreed to buy it of you at that time?

Ans. No.

Cross-int. 9. Was there a man out of town at that time that you expected would take it?

Ans. No.

Cross-int. 10. Was there a man out of town that you had negotiated the sale of it with or talked to him about selling it?

Ans. No.

Cross-int. 11. How soon after the loan was made were you called upon to pay it or asked to pay it?

Ans. To my recollection, I think four to six months.

Cross-int. 12. Not before then?

Ans. It might possibly been; my memory don't serve me there.

Cross-int. 13. How many times between that time and the 18th of August, 1868, were you asked to pay it?

Ans. To my best knowledge, it must have been five or six times.

Cross-int. 14. Will you swear it wasn't twice or three times that number?

Ans. No, sir; I won't.

Cross-int. 15. Hadn't you from the time of that loan up to August 16, 1868, been repeatedly and constantly requested and urged to take up that stock?

Ans. No, sir.

Cross-int. 16. You won't say that you haven't been requested to do it as much as twelve or fifteen times, will you?

Ans. It must have been twelve or fifteen times, at least.

76 Cross-int. 17. Can you designate or count the times with any accuracy?

Ans. No, sir.

Cross-int. 18. About how frequently was it—once a week, month, or three months?

Ans. About once a month.

Cross-int. 19. Why didn't you comply with the request?

Ans. I had no means.

Cross-int. 20. Had you no means when you negotiated the loan?

Ans. I had some.

Cross-int. 21. How soon did your means fail you after that; what little you had?

Ans. Up to within six or eight months of my leaving the street.

Cross-int. 22. How many months have you stated it was after making this loan before you left the street?

Ans. About ten months.

Cross-int. 23. After this making the loan, how long did you continue to have any means? State as near as you can.

Ans. That is impossible for me to do now.

Cross-int. 24. Before making this loan, were you a depositor in the Eliot National Bank; and, if so, how long had you been such?

Ans. Many years.

Cross-int. 25. After making the loan, how long did you continue such?

Ans. One year. I can't tell till I see my books.

Cross-int. 26. Did you take your account to any other bank before you left the street?

Ans. Only to one, where I had always kept an account ever since the organization of it.

Cross-int. 27. Where was that?

Ans. Boylston National.

Cross-int. 28. Didn't you cease depositing substantially in the Eliot National Bank soon after making this loan?

Ans. I think not.

Cross-int. 29. How soon did you, according to the best of your recollection?

Ans. To my best recollection, it must have been in the fall of 1867.

77 Cross-int. 30. What did you stop then for?

Ans. Hadn't enough to keep in both.

Cross-int. 31. Is that the only reason?

Ans. Yes, sir.

Cross-int. 32. What was the Hecla stock selling for at the time you pledged it in the market?

Ans. The average price was about 70 to 71.

Cross-int. 33. How much had been paid on it even at that time?

Ans. I don't understand the question. There had been three assessments, I think; one of ten, one of five, and one of fifteen, to my best recollection. I am very positive on that point.

Cross-int. 34. How long had you held the stock before you pledged it to the bank, as stated?

Ans. Less than twenty-four hours the first loan, the same with the second.

Cross-int. 35. Did you get the money of the bank with which to pay for the stock originally?

Ans. Part of it.

Cross-int. 36. What part of it?

Ans. Within between $4,000 and $5,000 of its cost.

Cross-int. 37. How soon did the stock begin to decline after you pledged it to the bank?

Ans. I can't now say.

Cross-int. 38. It was pretty soon, was it not?

Ans. I can't say.

Cross-int. 39. State as near as you can.

Ans. I have no recollection.

Cross-int. 40. Do you remember any time after the loan was made by the bank, between that time and Sept., 1868, when it was worth enough in the market to pay what was due the bank on the loan at the time?

Ans. I think so.

Cross-int. 41. When was it?

Ans. I can't now state.

Cross-int. 42. Will you swear that it was so at any time?

Ans. No, sir.

Cross-int. 42*a*. After the stock was pledged to the bank, before
78 1868, how many assessments were laid on it and asked for by the company?

(Objected to.)

Ans. I think four or five.

Cross-int. 43. Will you swear that that was all?

(Objected to.)

Ans. No, sir.

Cross-int. 44. When these assessments were made, were you notified of them?

Ans. Yes, sir.

Cross-int. 45. Were you asked to pay them?

Ans. Yes, sir.

Cross-int. 46. Did you pay any of them?

Ans. I think not.

Cross-int. Why didn't you?

Ans. I had no means—no money on hand.

Cross-int. 48. When you were asked to repay your loan at the various times spoken of, and to pay the assessments when called for, what did you say? State everything you said about it, as near as you can recollect?

Ans. I told them that I hadn't the money on hand.

Cross-int. 49. Is that all you stated?

Ans. To my best recollection.

Cross-int. 50. In all the interviews on that subject, have you related all you said on that subject, either in relation to the loan or stock?

Ans. No, sir.

Cross-int. 51. You were asked to state it. Then state it.

Ans. My claim to them was an answer that I hadn't the money on hand; but as I had kept a large deposit there on account, they were in duty bound to protect me.

Cross-int. 52. Is that all?

Ans. That's all, to my recollection.

Cross-int. 53. Do you mean to say that you kept repeating that every time they called on you?

Ans. Nearly in the same words—in the same manner.

Cross-int. 54. Did you know that the bank was compelled to pay, and did pay, the assessments on your failure to do it?

79 Ans. I presume so.

Cross-int. 55. How low down did that stock run between the

time of the loan and the month of September, '68, according to your recollection?

Ans. Fifty to fifty-five, to the best of my knowledge now.

Cross-int. 56. When was that? Fix it as near as you can.

Ans. I can't fix it.

Cross-int. 57. How did you receive the letter which you have produced, dated August 18, 1868?

Ans. I have no recollection, unless it was left at my office.

Cross-int. 58. Do you recollect whether any person handed it to you?

Ans. I do not.

Cross-int. 59. Will you swear there did not some person hand it to you?

Ans. No, sir.

Cross-int. 60. Have you any memory about it?

Ans. No, I haven't. Letters were frequently brought to my office, and left at my office, on the table. I can't tell who left it at that time.

Cross-int. 61. Then you have no particular recollection about this letter, have you?

Ans. No, sir.

Cross-int. 62. Do you remember what you did about it at the time?

Ans. I think I went to the bank and made the same request that I had previously done; that I hadn't the means, and requested them to hang on.

Cross-int. 63. Who did you see at that time and have a conversation with?

Ans. It was always my rule to go to the president.

Cross-int. 64. Do you remember of having a conversation then, in reply to that letter, with the president, so that you can swear to it?

Ans. Wanted the money very much.

Cross-int. 65. Is that all the conversation you had at that time?

Ans. Only repeating my request to them to hang on?

Cross-int. 66. Is that all that was said at the time?

Ans. To my best recollection.

80 Cross-int. 67. Will you swear that you had that precise conversation with the president on receiving that letter?

Ans. No, sir.

Cross-int. 68. Will you swear to any conversation that you had with him on receiving that letter, so that you can state it, in words or substance, as a matter of memory?

Ans. Merely what I stated before, begging him to hang on, to my best recollection.

Cross-int. 69. Have you a distinct recollection about it all?

Ans. I think I have.

Cross-int. 70. Where was it?

Ans. In the directors' room.

Cross-int. 71. Who was present besides you and him at the time?

Ans. Can't say. Might have been two or three; shouldn't mind them. Always go to headquarters—the captain of the concern, always.

Cross-int. 72. When did you see him next after that?

Ans. I have no recollection.

Cross-int. 73. Have you ever seen him since?

Ans. Yes, sir.

Cross-int. 74. State the first time you recollect seeing him afterwards?

Ans. I can't.

Cross-int. 75. State the next interview that you do recollect of having with him, and when it was, and what occurred between you?

Ans. Cannot.

Cross-int. 76. Will you swear that you didn't see him within a fortnight after the 18th of August, 1868?

Ans. No, sir.

Cross-int. 77. Do you mean that you did not see him, or that you will not swear that you didn't see him within that time?

Ans. I cannot swear either way, whether I did or did not.

Cross-int. 78. What was the next conversation you had with him or any one connected with the bank about that stock?

Ans. I can't say.

Cross-int. 79. How many more did you have?

Ans. Can't say that.

81 Cross-int. 80. With whom did you have the conversations about the stock after that?

(Objected to as assuming something that has not been testified to.)

Ans. Cannot say, if any.

Cross-int. 81. What is the next one you remember?

Ans. No one in particular, or to my recollection.

Cross-int. 82. Will you swear you didn't have any, as a matter of fact, after that, with any one?

Ans. No, sir.

Cross-int. 83. Did you see M'r Conant, cashier, after the 18th of August, 1868, to speak with him about it?

Ans. Frequently, when I made my deposits at that bank.

Cross-int. 84. Do you remember any conversation that you had with him about the stock after that?

Ans. No, sir.

Cross-int. 85. Did you have any?

Ans. I think not.

Cross-int. 86. Are you positive about it?

Ans. I cannot swear to it.

Cross-int. 87. Will you swear that you didn't have with Demeritt either? Are you so positive that you will swear that you didn't have?

Ans. No, sir.

Cross-int. 88. When you received the paper Exhibit 21, what did you do with that?

Ans. Opened it and threw it in my desk, locked my desk, got up, and cleared out to take a walk.

Cross-int. 89. Where was your desk and office at that time?

Ans. No. 1 Post-Office avenue.

Cross-int. 90. Who brought the paper last referred to in to you?

Ans. Have no recollection.

Cross-int. 91. Do you remember what occurred or was said at the time?

Ans. No, sir; only what I did myself.

Cross-int. 92. Had you at that time paid to the bank cash to the amount of $30,257.61, with which you were credited in that account in balancing the same?

Ans. No, sir.

82 Cross-int. 93. Had you not, just before receiving that account, had an interview with M'r Demeritt?

Ans. Not to my recollection.

Cross-int. 94. With M'r Conant?

Ans. Not to my recollection.

Cross-int. 95. Did you have one with either soon after?

Ans. Not to my recollection.

Cross-int. 96. Are you so positive that you will swear that you did not?

Ans. No, sir.

Cross-int. 97. What rate of interest were you to pay on that loan?

Ans. Lawful interest.

Cross-int. 98. What did you consider lawful interest at that time?

Ans. Six per cent., I think; it might have been seven.

Cross-int. 99. Had you had no talk with M'r Demeritt, or any other officer of the bank, about paying seven per cent. on this loan?

Ans. I am not positive.

Cross-int. 100. Do you recollect of having a conversation with either of them at that time about the difference it would make, reckoning the interest at six and at seven per cent.?

Ans. No, sir.

Cross-int. 101. Do you recollect of having a conversation with either of them about a sum of sixty or seventy dollars which you were to pay, being the difference between six and seven per cent.?

(Objected to as assuming that the witness agreed to pay the difference of sixty or seventy dollars.)

Ans. No, sir.

Cross-int. 102. Will you swear that you never did have any such conversation?

Ans. I have not the slightest recollection of anything of the kind—not the slightest, the faintest.

Cross-int. 103. Where have you kept the paper marked Exhibit 21 since you received it?

Ans. In my pocket-book, at home at my house.

Cross-int. 104. How often have you looked at it since then?

Ans. Very seldom.

83 Cross-int. 105. After getting it did you see either of the officers of the bank about it?

Ans. Not to my recollection. I felt rather too cast away to speak to anybody.

Cross-int. 106. Who did you suppose had paid the money in the settlement of your account at the bank, as appeared by that account which was rendered to you?

Ans. I hadn't the slightest idea.

Cross-int. 107. You read the account, didn't you?

Ans. When it was rendered? Yes; I have read the account.

Cross-int. 108. You saw that on the 8th of September, 1868, you were credited with cash on that account sufficient to balance it?

Ans. I did.

Cross-int. 109. Had you funds in the bank at that time with which to balance that account?

Ans. No, sir.

Cross-int. 110. Did you, at that time, know any means that the bank had to supply the cash to balance that account unless through the stock?

Ans. No, sir.

Cross-int. 111. Do you mean to say that you made no inquiry to ascertain where that money came from?

Ans. I think not. Feeling so dull at that time, I cared very little about anything; whether the stock went, or anything else, or about anything?

Cross-int. 112. Was the fact that your loan at the bank appeared to have been paid in cash to the full amount thereof the cause of your feeling cast away, as you state?

Ans. By their having sacrificed my stock.

Cross-int. 113. Then you knew at that time that the stock had been sold, didn't you?

Ans. Only by the report of the account stated.

Cross-int. 114. Then, by the report of the account stated, you understood that your stock had been sold, and the cash with which you were credited realized from it, didn't you?

Ans. By their representation of it? Yes, sir; in their account.

Cross-int. 115. By whose representation?

Ans. The account itself.

84 Cross-int. 116. The account says nothing about stock, or sale of stock, does it?

Ans. No, sir.

Cross-int. 117. How did you then know that the stock had been sold? That is, who told you?

Ans. The party who brought into my office that very account itself, stated the stock had been sold.

Cross-int. 118. State all he said.

Ans. I opened the account and said that I regretted extremely that my stock had been sacrificed; took the letter and threw it into my desk, the account?

(Answer objected to as not responsive.)

Cross-int. 119. Will you state all the party said who brought in the paper?

Ans. I don't recollect any conversation, or the person who brought it in, either.

Cross-int. 120. How did you know your stock had been sacrificed, then?

Ans. It was told me by the party who brought the account in an envelope. It might have been one of the officers of the bank. I couldn't swear who even gave me that account.

Cross-int. 121. What did he say it was sold for; that is, for how much?

Ans. Did not state only by the account.

Cross-int. 122. Whom did he say had brought it?

Ans. He did not state.

Cross-int. 123. Did you inquire?

Ans. Did not, to my best memory.

Cross-int. 124. Did you go to the bank to see about it?

Ans. Think not. Don't think I went anywhere.

Cross-int. 125. Did you after that make any inquiry at the bank about it until 1871, at the time you spoke to M'r Demeritt, as you say, in the street?

Ans. Think not.

85 Cross-int. 126. Didn't you, after getting the account, and learning that it had been sold, go to the bank, or see any of the officers of the bank, to object to it?

Ans. No, sir; not to my best recollection.

Cross-int. 127. Then you mean to be understood, do you, that it was reported to you that the bank had sold the stock, received and credited to you the proceeds, and that the account was rendered to you with the proceeds credited as cash, settling your account at the bank, and you did not go to the bank or otherwise make any objections thereto to any of the officers of the bank?

Ans. My only intelligence is the account. My seeing the account, and the party who brought the letter, gave me the information.

Cross-int. 128. Is that the only answer you desire to make to this question?

Ans. Yes, sir.

Cross-int. 129. By that account, was interest received at six per cent. or seven?

Ans. Never examined it.

Cross-int. 130. Don't you recollect that you had another item in your account relating to some government bonds?

Ans. What account do you refer to?

Cross-int. 131. To your account at the bank.

Ans. I don't understand the question, now.

Cross-int. 132. Don't you recollect that you had government bonds, which were sold, and the proceeds applied to the payment of any other loan, and wherein there was a surplus?

Ans. I had several loans. I don't know which one you refer to.

Cross-int. 133. After the account, Exhibit 21, was given you, didn't you receive another statement of an account where a surplus, growing out of the sale of some government bonds, was taken into account, and also the difference between interest reckoned at six and seven per cent. on the Hecla loan, so called?

Ans. No, sir.

(Adjourned.)

86 MARCH 25, 1873.

Cross-int. 134. Were you a member of the stock board in Boston ever; and, if ever, how long?

Ans. I entered the board in 1846. Twenty-seven years. I am a member at the present time.

Cross-int. 135. Have you been a member continuously during all of that time, or was there a time when you ceased to be a member of that board?

Ans. Only at the time of my misfortunes, that I was out of business; nearly two years.

Cross-int. 136. State when those two years begun, and when ended.

Ans. 1869 to 1871; late in 1871.

Cross-int. 137. How early in 1869 did you cease to be a member? Fix it as near as you can.

Ans. It must have been about the middle; I think July or August.

Cross-int. 138. You said, did you not, at the time of your sickness you were out?

Ans. Yes, sir.

Cross-int. 139. What sickness or kind of sickness do you refer to?

Ans. Gravel.

Cross-int. 140. Did you have any other trouble?

Ans. No, sir.

Cross-int. 141. When did you cease to have an office in State street or its vicinity, and for how long a time were you without one?

Ans. I think it was in July or August, 1869. Up to the latter part of 1871, or the 1st of January, 1872.

Cross-int. 142. Were you buying and selling stock in the Hecla Company during September 8, 1868, and July or August, 1869, either on your own account or as a broker?

Ans. I think not.

Cross-int. 143. Are you sure?

Ans. I am very positive. I should have to refer to my book to tell positively.

Cross-int. 144. Will you refer to your books and see?

Ans. I will.

87 Cross-int. 145. That stock was being sold at the board during those dates, was it not?

Ans. Probably.

Cross-int. 146. You were conversant with the market prices of that stock during the time, were you not?

Ans. Yes.

Cross-int. 147. When did the consolidation of the Hecla with the Calumet and other companies occur?

Ans. I don't recollect.

Cross-int. 148. State as near as you can.

Ans. It would be all guess-work.

Cross-int. 149. Did you know of it at the time it occurred, or about the time?

Ans. It was intimated to me. By intimation only.

Cross-int. 150. How was it intimated to you; by whom?

Ans. It was in the board, and well known by many of the members there.

Cross-int. 151. Did you at the time, or about the time, go to see anything about the stock formerly yours, named as having been pledged to the bank in 1866?

Ans. No, sir.

Cross-int. 152. Did you make any inquiries about it?

Ans. No, sir.

Cross-int. 153. Did you take any steps about it any way whatever, either by act, inquiry, or word?

Ans. No, sir,

Cross-int. 154. After the 8th of September, 1868, to July or August, 1869, were you at the office of the Hecla Co. in Boston?

Ans. Think not.

Cross-int. 155. Are you sure?

Ans. Very.

Cross-int. 156. Were you between July, 1869, and the time you resumed your place at the brokers' board?

Ans. Think not.

Cross-int. 157. Are you sure?

Ans. Very sure.

Cross-int. 158. Did you take the Boston newspapers between
88 July and August, 1869, when you left the brokers' board, and the time when you returned and resumed your place?

Ans. Yes, sir.

Cross-int. 159. Were you accustomed to read the report of sales of stock during that time made in Boston?

Ans. Very frequently, but not constantly.

Cross-int. 160. Did you notice or note during that time the prices at which the Hecla, or Calumet and Hecla, sold?

Ans. Whenever I read the papers. Whenever I read the stock reports, I mean.

Cross-int. 161. Was that not a frequent, if not a constant, occurrence?

Ans. I cared so little about it, it was not frequent.

Cross-int. 162. Did you not read in the papers notices of the consolidation spoken of; also, of the dividends being paid?

Ans. I think I did.

Cross-int. 163. Did you not know or hear as to the terms of consoli-

dation or the amount of stock delivered to the parties respectively holding the old stock?

Ans. By the papers.

Cross-int. 164. Did you go to take any part in the matter yourself or make any claim of any stock as belonging to you?

Ans. No, sir; I think I had none.

Cross-int. 165. You understood, then, that the stock you formerly held was sold and transferred, didn't you, by the bank?

Ans. I don't understand exactly the question.

Cross-int. 166. If you didn't have any stock—understood you had none—and took no steps in relation to it, you then knew that the bank had sold and transferred the stock which they formerly had of you and held in pledge, didn't you?

Ans. I supposed so.

Cross-int. 167. After the 8th of Sept., 1868, did you go to see to whom the bank had transferred the stock?

Ans. No, sir.

Cross-int. 168. Did you take no interest in it, and make no inquiry?

Ans. I took some interest, but made no inquiry.

89 Cross-int. 169. What did you do about it when you learned the fact?

Ans. Nothing at all; only regretted it.

Cross-int. 170. Did you not speak of it at interviews you had with M'r Demeritt, or M'r Conant, the cashier?

Ans. I think not.

Cross-int. 171. You saw by the account rendered the price at which it was sold, did you not?

(Objected to as assuming that the account states any price.)

Ans. No, sir; no price mentioned.

Cross-int. 172. You saw by the account the sum of money which the stock brought, didn't you?

Ans. Yes, sir.

Cross-int. 173. Didn't that indicate to you the price per share by dividing it by the number of shares?

Ans. It would do so. Never tried it.

Cross-int. 174. Do you mean to say that at the time that sale was reported to you in the account, in the aggregate of the amount of money which it brought, you did not think or look to see at what price it was sold as compared with the then market price?

Ans. Most positively I did not and never did.

Cross-int. 175. And that you didn't take interest enough in it to inquire who the purchasers were?

Ans. Yes, sir.

Cross-int. 176. You mean that, do you?

Ans. Yes, sir.

Cross-int. 177. Nor at what price it was sold?

Ans. Yes, sir.

Cross-int. 178. Nor on what terms it was sold or otherwise?

Ans. Yes, sir.

Cross-int. 179. Nor whether it had been transferred?

Ans. Yes, sir.

Cross-int. 180. And do you mean to say that from that time until the time you left the board you never had or sought any information on any of these subjects?

Ans. Yes, sir.

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Ans. I will.

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Ans. No, sir.

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Ans. Think not.

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Ans. Very.

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Ans. Yes, sir.

Cross-int. 178. Nor on what terms it was sold or otherwise?

Ans. Yes, sir.

Cross-int. 179. Nor whether it had been transferred?

Ans. Yes, sir.

Cross-int. 180. And do you mean to say that from that time until the time you left the board you never had or sought any information on any of these subjects?

Ans. Yes, sir.

Cross int. 181. You mean by "yes, sir," that you did not have
90 any information on any of those subjects, and that you made no inquiries about them?

Ans. Yes, sir.

Cross-int. 182. You were meeting during that time Mr Denerit, Mr Conant, and other officers of the bank frequently, wasn't you, between September 8, 1868, and July and August, 1869, when you left the brokers' board?

Ans. In the street or on 'change.

Cross-int. 183. Well, you were on speaking, friendly terms with them, wasn't you, so that you conversed with them when you met them?

Ans. Yes.

Cross-int. 184. Did you at any of those times ever allude to that stock or the sale of it?

Ans. I think not.

Cross-int. 185. Are you sure?

Ans. Very positive.

Cross-int. 186. You, seem, then to have felt very little interest in it, and cared very little about it at those times; is that so?

Ans. I felt so discouraged I cared very little about anything.

Cross-int. 187. Discouraged about what?

Ans. The sale of the Hecla stock; coulda't help myself, nor pay the loan.

Cross-int. 188. If the stock had been sold and the loan paid, what were you troubling yourself about the loan for?

Ans. I knew the stock would be better in future. When the assessments were made there was an intimation that they would all be returned again in stock, as the company had not issued the whole number of shares which they intended to do.

Cross-int. 189. If you so thought and felt, was not that the very reason why you would have looked after it and cared more about it, and who bought it and what was paid for it?

Ans. No. At the time after the sale was made, I thought nothing could be done by myself.

Cross-int. 190. When did your interest in that stock revive?

Ans. I can't say.

91 Cross-int. 191. What was the Hecla stock selling for in the market from the first of September to the 8th of September, 1868?

Ans. Don't recollect.

Cross-int. 192. Did you know at the time?

Ans. Yes.

Cross-int. 193. State what it was, as near as you can now recollect.

Ans. I really don't recollect.

Cross-int. 194. Was it less or more than the price reported to you in the account which you have produced, showing what it brought?

Ans. There was no price mentioned in the account, and I never saw it but twice in my life until I saw it in this room; twice or three times, not beyond three.

Cross-int. 195. How came your counsel to have that paper—to bring it to this room?

Ans. I brought it to him.

Cross-int. 196. Where did you get it, and where had you kept it since you received it in the first place?

Ans. In the first place I put it in my desk. When I left my office for good in 1869, my books and papers were taken home to my house in Boston Highlands; the books and papers were all placed in the barn

chamber. I then, after a while, probably a month or several months, went to assort them out, and took anything I thought valuable in the papers and placed them in a drawer in a book-case in my library. I did not see that paper for certainly a year and a half afterwards, or two years.

Cross-int. 197. Was the Hecla stock not selling in the market just prior to the 8th of September, 1868, at less than eighty five dollars a share?

Ans. I really can't say. I don't really know. If it was, I didn't know it, and I don't recollect it.

Cross-int. 198. When the sale of the stock by the bank was reported to you, do you mean to say that at that time the sum which it brought was less than the then market price for which it was then selling in the market?

(Objected to, as assuming that the sale of the stock by the bank was reported to the witness.)

Ans. Can't say; I don't know.

Cross-int. 199. Did you know at the time whether it was?

92 (Same objection.)

Ans. Probably did at the time, undoubtedly. Don't recollect now.

Cross-int. 200. What, according to your best recollection and impression, is the fact whether that stock was then worth in the market less or more than eighty-five dollars?

Ans. All guess-work to say.

Cross-int. 201. At the time the amount which it brought was reported to you, did it occur to you, or did you think or care or inquire, how the sum brought compared with the market price?

(Objected to, as assuming that the amount which the stock brought was reported to the witness.)

Ans. Never. I didn't care anything about it.

Cross-int. 202. How was the market price on the 18th of August, 1868, when you were asked to pay the loan instalments and redeem the stock?

Ans. Do not recollect.

Cross-int. 203. Was it worth enough then in the market to pay the debt to the bank for which it stood pledged and held?

Ans. I do not recollect, I am sure.

Cross-int. 204. What is your impression about it?

Ans. I have none. No recollection of the price.

Cross-int. 205. Why didn't you between the 18th of August and the 8th of Sept., 1868, realize on the stock and pay the debt, if it was worth enough to pay it?

Ans. Because I did not wish to sell and endeavored to get the loan taken from the bank and placed in some other place, and also entreated the president and directors to hang on to it, as I had done so much for the bank, as they were in duty bound to protect me, as I helped establish the bank by giving them subscriptions, I think, of over one thousand shares; from one spot was 500, the Eliot Fire Insurance Company —of which concern I was then a director—voted most strenuously to have it done. The president then was M'r A. Howe; R. L. Day, cashier. And whilst I kept my account there, always kept a good balance, and have frequently kept money there, and borrowed it myself to help the bank, and left my own there without touching it. Besides protecting the stock in the market, and having it stowed away, as we

call it, by getting parties to take it whenever I found it for sale.

93 (Objected to as irresponsive.)

Cross-int. 206. Do you mean to swear that between the 18th of Aug., 1868, and the 8th of Sept., 1868, you don't know that the price at which the Hecla stock was selling in the market was less than enough to pay your debt at the bank, for which the 450 shares pledged by you were held?

Ans. I do not now recollect what the price was, but I can easily tell by referring to my stock-book, or the prices-current.

Cross-int. 207. Was there a time for a year before that time that the price that that stock brought in the market was enough to pay your debt at the bank?

Ans. I think so. I can't say. I really don't recollect what the price was during that time.

Cross int. 208. Do you know M'r Curtis, a director of the bank?

Ans. Very well.

Cross-int. 209. Did he ever, before Sept. 8, 1868, come to see you about your paying the loan and redeeming the stock?

Ans. I don't recollect.

Cross-int. 210. Will you swear he didn't?

Ans. No, sir.

Cross-int. 211. Will you swear to anything he said to you, or you to him, at any time before that date about it?

Ans. About what?

Cross int. 212. About your debt or stock; that is, paying the debt or redeeming the stock?

Ans. I recollect on one occasion—I can't recollect the dates—I was in the bank; I think it was Demeritt pushed me for the loan. I rushed in to see M'r Curtis at the Eliot Fire Insurance Company. I told him about it, and they let me off for a while; how long a time I can't recollect.

Cross-int. 213. Is that the only interview you recollect of ever having with M'r Curtis about it?

Ans. Yes, sir.

Cross-int. 214. Didn't you tell M'r Curtis, on one occasion, in words or substance, that you couldn't pay the loan; that the bank must make the debt, or what they could out of it, from the stock?

Ans. Not to my recollection.

94 Cross-int. 215. Didn't the president, or other officer of the bank, urge you at one or more times to get your friends to help you to pay the loan and take up the stock, and even offer to aid you in carrying it, or a part of it, if you would get some help from other sources?

Ans. Yes, sir.

Cross int. 216. Who did it, and when and how often did they make such an offer?

Ans. I can't say.

Cross-int. 217. What did you say to it? Did you comply with their request?

Ans. I had no rich friends to go to. It was true enough then, and now, too.

Cross-int. 218. Is that what you said to them at the time?

Ans. Yes, sir.

Cross-int. 219. Were you in your right mind between the 1st of August, 1868, and the 1st of January, 1869?

(Objected to as impertinent, under the rules of equity practice.)

Ans. I think I was.

Cross int. 220. Is your memory clear as to what occurred during that period?

Ans. Yes, sir.

Cross-int. 221. Is your memory good now, or has it failed since then?

Ans. It is not quite as good now as it was then; not quite, owing to misfortune.

Direct examination resumed:

Int. 32. Were you keeping an account in the Eliot National Bank as depositor, in the year 1868?

Ans. I think not.

Int. 33. Don't you know whether you were or not?

Ans. Very positive I was not. No, I was not.

Int. 34. Did you ever say to Mr Conant, the cashier, having reference to the account that was rendered you, and now shown you as Exhibit 21, that you were glad to be from "under the harrow," or words to that effect?

(Objected to.)

Ans. No, sir.

CHARLES L. HAYWARD.

95 *Deposition of Joseph G. Martin.*

Direct examination by E. F. Hodges, esq., of counsel for complainant.

MARCH 14, 1873.

Int. 1. What is your name, age, residence, and occupation?

Ans. Joseph G. Martin; fifty; Boston; stock-broker.

Int. 2. Have you kept a list of the prices of stocks and shares in the Boston market for some time past, and how long?

Ans. I have; over twenty years.

Int. 3. Have you brought with you a list containing the prices of shares since 1868?

Ans. I have; all the public sales.

Int. 4. Please state the prices at which shares in the Hecla company have sold from the 1st of September, 1868, to the 1st of May, 1871, in the first eight days of each month embraced in that period.

Ans. Sept. 5, 1868—$76 per share.
" 19, " —$88 "
Oct., Nov., and Dec.—No sale.
Jan., 1869.—No sale.
Feb. 17, 1869.—$85 per share.
March 18, 1869, $80 "
April 6, " $80 " 8 shares.
" 22, " $80 "
May 21, " $85 "
" 28, " $85 "
June 1, " $85 "
" 14, " $86 "
July 7, " $80 "
Aug. 24, " $85 "
Sept. " —No Sale.
Oct. 15, " $80 per share.

	Nov.	23, 1869,	$885	per share.	
	Dec.	30, "	$876	"	Dividend off, $5.
	Jan.	3, 1870,	$875	"	
	"	22, "	$880	"	
	"	27, "	$880	"	
96	Jan.	28, 1870,	$880	per share.	
	Feb.	3, "	$881	"	
	"	17, "	$87.50	"	
	March	"	—No sale.		
	April,	1870.—No sale.			
	May,	"	"		
	June,	"	"		
	July,	"	"		
	Aug.	23, 1870.—	$880	per share.	
	Sept.	21, "	$880	"	
	Oct.	4, "	$885	"	
	"	6, "	$885	"	
	"	7, "	$890	"	Buyer 60.
	"	20, "	$100	"	"
	Nov.	7, "	$100	"	
	"	16, "	$113	"	
	"	17, "	$115	"	
	"	21, "	$115	"	
	"	25, "	$125	"	
	Dec.	16, "	$125	"	
	Jan.,	1871. —No sale.			
	Feb.	1, "	$135	per share.	Dividend off, $5.
	March,	"	—No sale.		
	Apr.	14, "	$160	per share.	
	"	19, "	$175	"	

Int. 5. Please state the prices at which shares of the Calumet and Hecla Mining Co. sold in this market from May, 1871, to the present time.

(Objected to.)

Ans. The first sale that I find of the consolidated company was—

	June	15, 1871.—	$115	per share.	
	"	19, "	$116	"	
	"	27, "	$120	"	
	July	14, "	$125	"	
	"	22, "	$135	"	
	Aug.	8, "	$103	ex div. 20 per cent. in stock and 5 per cent. in cash.	
97	Aug.	10, "	$103	ex div. 20 per cent. in stock and 5 per cent. in cash.	
	"	12, "	$103	ex div. 20 per cent. in stock and 5 per cent. in cash.	
	"	22, "	$102	per share.	One share.
	Sept.	6, "	$99.50	"	
	"	29, "	$110.50	"	
	Oct.	16, "	$105	"	
	"	31, "	$110	"	
	Nov.	10, "	$89.25	"	Ex div. stock, 1 share in 7, and $5 cash.
	"	29, "	$106	"	
	Dec.	13, "	$105.50	"	Only sale that month.
	Jan.	2, 1872.—	$110	"	

Jan. 8, 1872.—$115 per share.
" 9, " $115 "
" 13, " $95 75 " Ex div. 10,000 shares in stock & $5 per share in cash.
" 22, " $115 "
Feb., " $114⅝ to $135 per share.
March, " $128½ to $150 "
April, " $150 to $161½ "
May, " $137½, ex div. $5, to $155 per share.
June, " $152 to $164 per share.
July, " $157 to $158, both ex div. $5.
Aug., " $150½, ex div. $5, to $157 per share.
Sept., " $161 to $152 per share.
Oct., 1872, $150 to $159 per share.
Nov., " $151, ex div. $5, to $145 per share.
Dec., " $149⅜ to $160 " "
Jan., 1873, $152¼, ex div. $5, to $158½ per share.
Feb., " $152⅜, " $5, " $150 " "
March 3, 1873, $158⅜ per share to
" 14, " $157 " "

98 Cross examination by A. A. Ranney, esq., of counsel for defendant.

Cross-int. 1. Have you the means at hand by which you can state the number of shares sold at the respective times covered by the two last questions?

Ans. I have not.

Cross-int. 2. Were the sales made at the brokers' board, or where?

Ans. At the brokers' board.

Cross-int. 3. Do you know whether they were genuine, actual sales carried out, or whether they were nominal?

Ans. I have made, during the time named, purchases and sales of several hundred shares at the brokers' board, personally; that is the only thing I can swear to about the sale.

Cross-int. 4. Are not sales frequently made at the brokers' board which are merely nominal, for the purpose of affecting the market price?

Ans. I should answer in general terms, they were not. I don't mean to imply by that that there never was a sale of that kind, but as a rule.

Cross-int. 5. Will you give the sales of that stock in this market from the seventeenth of October, 1866, to first of September, 1868?

Ans. I will prepare a statement, and hand it to the examiner, to be annexed to this deposition.

(Statement produced and marked "Exhibit 33, E. T. N., Examiner.")

J. G. MARTIN.

99 EVIDENCE FOR DEFENDANT.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me.

EDWIN T. NASH,
Special Examiner.

Present, E. F. Hodges, esq., of counsel for complainant; A. A. Ranney, esq., of counsel for defendant.

Deposition of Joseph H. White.

BOSTON, *April 5*, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. What is your name, age, residence, and occupation.

Ans. Joseph H. White; 49; commercial business; Boston.

Int. 2. If a director in the Eliot National Bank, state how long you have been a director.

Ans. I am now a director. My impression is I have been a director for from one to two years previous to 1868.

Int. 3. State whether you knew of a loan in the bank to Chas. L. Hayward, with a pledge of 450 shares of stock in Hecla Mining Company, and what you knew of it before Sept. 8, 1868?

Ans. I knew that this loan had been made to him by the bank before I came into the bank. I am quite sure it was before I came to the bank.

Int. 4. State what had occurred among the directors of the bank about selling the said stock before Aug. 17, 1868, when a vote was passed about its redemption or sale.

(Objected to, as the directors must speak by their records.)

Ans. At several of the meetings of the directors this matter was brought up to have this matter settled up, and some of the directors were anxious to have it sold at the time, and have the balance
100 charged to profit and loss, to close up the matter; and I believe at one of these meetings there was a vote passed to notify M'r Hayward that if he couldn't pay something at certain times *that* the stock would be sold. At some meeting after, M'r Demeritt reported he had seen M'r Hayward, and could make nothing out of him, and we must make the most we could by selling it.

(Answer objected to by counsel for complainant, as speaking of things taking place in the absence of M'r Hayward, and because it is hearsay testimony.)

Int. 5. State what you know of being done about the sale of the stock after August 17, 1868, when the vote was passed.

(Objected to.)

Ans. The stock after that was sold to three of the directors, on condition that M'r Hayward should have the opportunity to take the stock, to pay, or make arrangements to take it himself. The stock was sold to three of the directors, with this exception, that M'r Goodwin's friend, as I understood, was to take half of the third allotted to him. After this M'r Demeritt reported that he had seen M'r Hayward, and that he could not take the stock, and he must sell it, as he proposed, to these parties. So the sale was made to the parties mentioned.

(Answer objected to as being incompetent.)

Int. 6. State whether you bought and took any portion of the stock; and, if so, how much?

Ans. One hundred and fifty shares.

Int. 7. On whose account did you buy it, and who has held and owned it since?

Ans. I bought it on my own account, and have owned and held it ever since.

Int. 8. What interest, if any, has the bank had in it since you bought and had it transferred to you?

Ans. None whatever.

Int. 9. Who has received and had the dividends in stock or cash since ou bought the stock?

Ans. I have.

Int. 10. You speak of stock being sold to you on a condition that M'r Hayward was to have the right to take the stock himself; what do you mean by this? Explain more fully.

101 Ans. I mean that if he could make any arrangement to pay any portion of it, or give any further security, the bank would carry it along. M'r Demeritt reported he said he could not pay or do anything about it, and that the bank must make the most they could out of the stock.

(Answer objected to as incompetent.)

Int. 11. In your answer to fifth question, you say "the stock was sold to three of the directors, on condition that M'r Hayward should have the opportunity to take the stock, to pay, or to make arrangements to take it himself." What do you mean by the word "sale," in this answer?

(Objected to.)

Ans. At the time this sale was made to us, it was after M'r Hayward had the offer to make arrangements for it himself. There was no condition at the time we actually bought the stock, because he, M'r Demeritt, had seen M'r Hayward previous to the real sale to us.

Int. 12. Do you mean the actual sale then, or the proposition to sell to you and the other persons named in this statement referred to in your 5th answer?

(Objected to as leading and incompetent.)

Ans. Well, I don't know. That answer answers the question.

Int. 13. Please state more fully, then, just what occurred in the transaction in making the sale of the stock to you and M'r Goodwin and M'r Robinson, in the order in which it occurred, and what was said and done.

(Objected to.)

Ans. At the time we proposed first to buy this stock, or I will say previous to our buying this stock, M'r Demeritt stated he would like to give M'r Hayward an opportunity to take it out of the bank by paying for it if he could. But he could not, and the stock was sold to us, or afterwards sold to us.

Int. 14. When the stock was sold and transferred to you, state whether there was any, and, if any, what agreement or arrangement made, whereby M'r Hayward was to have an opportunity to take the stock after that, or was to have any interest in it.

Ans. No arrangement or agreement with him. He was to have no interest whatever in the stock or the sale. (Question repeated.) He had no opportunity to take it after that; no interest in it after that.

102 Int. 15. My question was as to whether any arrangement or agreement was made with the bank as to giving M'r Hayward any right to take the stock after it was sold to you and the other persons by the bank?

Ans. There was not.

Int. 16. If there was any condition, then, in the actual sale as made to you and the other parties, please state what it was.

Ans. There was no condition about it.

Int. 17. State what you know, if anything, about M'r Hayward, the complainant, being informed of the fact that three of the directors were going to buy the stock?

(Objected to, unless the witness speaks of what he himself knows as taking place in the presence of M'r Hayward.)

Ans. I understood he was informed. It was so stated in the bank. M'r Demeritt stated so; that he had seen and informed him of the parties he was going to sell it to, and he told him to make the sale.

Int. 18. You say "it was so reported in the bank." State whether

you were or were not present when this report was made by M'r Demeritt?

(Objected to.)

Ans. I was present, and heard him make the statement.

Int. 19. State what occurred at the time, and what was done. Give the transaction as it occurred, and as you saw and heard it.

(Objected to.)

Ans. M'r Demeritt stated at the time that Hayward couldn't do anything about the stock, and the sale was made to the parties named, or to us, the directors, and stated that M'r Hayward agreed to it.

Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. When did you purchase this stock of the bank?

Ans. Sept. 8, 1868.

Cross-int. 2. Was there a meeting of the board of directors that day?

Ans. I am not positive.

Cross-int. 3. Was M'r J. G. Weld the person you referred to as having an interest with M'r Goodwin?

Ans. He was.

103 Cross-int. 4. Was he present at any time during your negotiations for the stock?

Ans. I think not, but am not sure.

Cross-int. 5. Do you know him personally?

Ans. I do not.

Cross-int. 6. Were you engaged in this negotiation more than one day, the 8th of September?

Ans. The transaction was completed that day; the arrangement might have been made a few days previous.

Cross-int. 7. Did you make or commence any arrangements or negotiations before the 7th of September, the day previous?

Ans. I couldn't say positively.

Cross-int. 8. When you commenced and made the arrangements that you speak of, was it done at a meeting of the board of directors?

Ans. I should think it was.

Cross-int. 9. Was there kept a record of the doings of that meeting?

Ans. I can't say.

Cross-int. 10. Can you say who of the directors was present at that meeting?

Ans. I could not say positively whether they were all there or not.

Cross-int. 11. Was Walter Hastings there?

Ans. I could not say positively.

Cross-int. 12. Was John P. Robinson there?

Ans. He was.

Cross-int. 13. Was M'r Cotting there?

Ans. I cannot say positively.

Cross-int. 14. Was M'r Curtis or M'r Proctor or M'r Pierce there?

Ans. I cannot say positively. Some of them were there, but which of them were there I cannot state positively.

Cross-int. 15. Will you state that either of the men named in that interrogatory were there?

Ans. I cannot state positively.

Cross-int. 16. Have you not seen the records of that meeting recently?

Ans. I have not.

Cross-int. 17. What price did you pay for this one hundred and

104 fifty shares of stock you say you purchased, and how did you pay for it, whether in cash or otherwise, and when?

Ans. The price was about eighty-seven dollars, as near as I recollect. I paid for it my note, at six months discount at the bank, and paid the note when it was due.

Cross-int. 18. Have you the note? If not, where is it?

Ans. I have not. I either destroyed it after I paid it, or else it was burned in my safe at the time of the fire.

Cross-int. 19. Did you bargain for this stock at a fixed price per share, or did you fix the price in bulk?

Ans. I understood it was to be a price to about cover the amount which the bank loaned M'r Hayward, with interest, which would be about $87 per share.

Cross-int. 20. Were you present at any interview between M'r Demeritt and M'r Hayward between the 1st of Sept. and the 8th of Sept., 1868, concerning the stock?

Ans. I was not.

Cross-int. 21. What amount did you propose to give the bank for this stock; was it a sum presented in figures, and so fixed, or was it the amount due upon M'r Hayward's loan, principal and interest?

Ans. It was a sum fixed in figures, I think, which represented the loan and interest, as I recollect it.

Cross-int. 22. Was that your first proposition to the bank?

Ans. I think it was.

Cross-int. 23. When was that made, and to whom?

Ans. It was a few days previous to the purchase, and made at a meeting of the directors.

Cross-int. 24. At the meeting before spoken of, at which the directors then present, you have said, you are not able to state; is that so?

Ans. At some meeting—I wouldn't swear positively which meeting; but at some meeting.

Cross-int. 25. At how many meetings of the directors was this proposition to sell that stock to you three gentlemen, presented and considered?

Ans. I could not say.

Cross-int. 26. Was it ever presented at any meeting of the directors, except the meeting held on the 7th of September, 1868?

105 Ans. I couldn't swear positively.

Cross-int. 27. With what person did you make the bargain to purchase this stock?

Ans. I should say, with the president, John Demeritt.

Cross-int. 28. State the exact terms upon which you bought that stock; what you were to give; when you were to pay; what rate of interest; how you were to secure the payment, if any way, and whatever other rights you had under that contract.

Ans. I was to give about $87 a share, and I had the privilege of giving my note, if I chose, which I did, at six months, at six per cent. interest. I secured the note with an indorser, and had no other right.

Cross-int. 29 (de bene). In answer to the 18th interrogatory, you have said that M'r Demeritt made certain statements. State when and where and in whose presence those statements were made.

Ans. They were made at the bank, at the meeting of the directors. I cannot state positively which directors were there; whether all or not.

Cross-int. 30. At a meeting of the directors held on the 7th or 8th of Sept., 1868, or at what other time?

Ans. I am not sure what date the directors' meetings were. I have no record of it at hand.

Cross-int. 31. Was it at a meeting held in August, 1868?

Ans. I cannot say positively as to the time, but some time from the last of August to the 8th of Sept., 1868.

Cross-int. 32. Were those statements made at more than one meeting of the directors?

Ans. I do not recollect.

Cross int. 33. Were they made before or after the proposition to purchase the stock?

(Answer to interrogatory 17 read to witness.)

Ans. The statement of M'r Demeritt, in regard to the stock, was made after we proposed to buy the stock.

Cross-int. 34. From whom did the proposition to sell or buy come; the purchasers or M'r Demeritt?

Ans. From the purchasers.

Cross int. 35. Have you any means of ascertaining who was present at the meeting of the directors, at which the statement of M'r
106 Demeritt, before referred to, was made, either from your own books or the books of the bank?

Ans. I have none of my own. The bank record may show.

Cross-int. 36. Were you present at any interview between M'r Hayward and any officer of the bank, between the latter part of August and the eighth of Sept., 1868?

Ans. I was not.

Cross-int. 37. Do you know M'r Hayward?

Ans. I do not.

Direct examination resumed:

Int. 20. Was the sale of the stock in question to you, M'r Goodwin, and Robinson, made with or without the consent or direction of the other directors? State what you knew or saw or heard on that subject at the time.

Ans. It was made with the consent of the other directors, and my impression is they were all, or nearly all, present; those beside the purchasers.

Int. 21. Was the meeting of the directors, referred to in cross question thirty, at which M'r Demeritt made the statements given, before or after the sale to you and the other persons named was concluded?

Ans. Before, I should say.

Cross examination resumed:

Cross-int. 38. Did you, personally, ever speak, or hear any one else speak, to M'r Cotting, a director in the Eliot National Bank, concerning the purchase of that stock, by the three directors?

Ans. I don't recollect anything about it.

Cross-int. 39. The same question as to Walter Hastings.

Ans. I don't recollect.

Cross-int. 40. The same question as to George A. Curtis.

Ans. I don't recollect.

JOSEPH H. WHITE.

Witness recalled. Direct examination resumed:

Int. 22. When the directors voted to sell the stock in question to you, M'r Goodwin, and M'r Robinson, did you act or vote with them in that action? State how that fact was.

107 (Objected to as assuming that it has been stated that the directors did vote to sell the stock, and because it calls for what should appear of record, if it exists.)

Ans. I did not vote with them.

Int. 23. State whether there was or was not a vote to sell passed by the directors.

(Objected to as calling for what should be matter of record.)

Ans. There was.

Int. 24. Did M'r Robinson or M'r Goodwin vote or act in the vote passed as directors?

(Objected to as calling for what should be matter of record.)

Ans. They did not.

Cross-examination resumed:

Cross-int. 41 (de bene). Did the directors vote to sell the stock at a regular or stated meeting of the board?

Ans. They did, all but these purchasers; they did not vote.

Cross-int. 42. And you mean to be understood to say that that vote was passed at a regular or stated meeting of the board, do you?

Ans. Yes, sir.

Cross-int. 43. Was it propounded to the board in writing or orally?

Ans. I should say orally, but I am not positive. I think orally, but I can't say positively.

Cross-int. 44. Will you say that Walter Hastings or M'r Cotting or M'r Pierce or M'r Curtis or M'r Proctor—was either, and which of them, present at that meeting?

Ans. My impression is that M'r Hastings, M'r Proctor, and M'r Curtis were there. My impression is the other two men were not directors at the time; I can't say positively—especially M'r Pierce, I am quite sure, was not a director.

Cross-int. 45. And that is the meeting that you have spoken of as taking place between the last of August and the 8th of Sept. 1868, is it not?

Ans. Yes.

JOSEPH H. WHITE.

108 *Deposition of Francis Harrington.*

APRIL 5, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. What is your name, age, residence, and occupation?

Ans. My name is Francis Harrington; residence, Salem; age, 40; occupation, paying teller Eliot National Bank.

Int. 2. How long have you been paying teller or otherwise in the Eliot National Bank?

Ans. I've been in the Eliot Bank, I think, since January, 1854, and in the National since its formation.

Int. 3. Will you look at the paper now shown you, being Exhibit 21, and state in whose handwriting it is, and who made it out?

Ans. It is in my handwriting. I made it out.

Int. 4. At whose request, if any one's, was it made, and what did you do with it after it was made?

Ans. It was made at the request of M'r Demeritt, president of the bank. I handed it to him.

Int. 5. Had you any knowledge of it, or what was done with it afterwards?

Ans. No; I had not.

Int. 6. Will you look at the item credit in that account, Exhibit 21,

Ans. I cannot say positively as to the time, but some time from the last of August to the 8th of Sept., 1868.

Cross-int. 32. Were those statements made at more than one meeting of the directors?

Ans. I do not recollect.

Cross int. 33. Were they made before or after the proposition to purchase the stock?

(Answer to interrogatory 17 read to witness.)

Ans. The statement of M'r Demeritt, in regard to the stock, was made after we proposed to buy the stock.

Cross-int. 34. From whom did the proposition to sell or buy come; the purchasers or M'r Demeritt?

Ans. From the purchasers.

Cross int. 35. Have you any means of ascertaining who was present at the meeting of the directors, at which the statement of M'r
106 Demeritt, before referred to, was made, either from your own books or the books of the bank?

Ans. I have none of my own. The bank record may show.

Cross-int. 36. Were you present at any interview between M'r Hayward and any officer of the bank, between the latter part of August and the eighth of Sept., 1868?

Ans. I was not.

Cross-int. 37. Do you know M'r Hayward?

Ans. I do not.

Direct examination resumed:

Int. 20. Was the sale of the stock in question to you, M'r Goodwin, and Robinson, made with or without the consent or direction of the other directors? State what you knew or saw or heard on that subject at the time.

Ans. It was made with the consent of the other directors, and my impression is they were all, or nearly all, present; those beside the purchasers.

Int. 21. Was the meeting of the directors, referred to in cross question thirty, at which M'r Demeritt made the statements given, before or after the sale to you and the other persons named was concluded?

Ans. Before, I should say.

Cross examination resumed:

Cross int. 38. Did you, personally, ever speak, or hear any one else speak, to M'r Cotting, a director in the Eliot National Bank, concerning the purchase of that stock, by the three directors?

Ans. I don't recollect anything about it.

Cross-int. 39. The same question as to Walter Hastings.

Ans. I don't recollect.

Cross-int. 40. The same question as to George A. Curtis.

Ans. I don't recollect.

JOSEPH H. WHITE.

Witness recalled. Direct examination resumed:

Int. 22. When the directors voted to sell the stock in question to you, M'r Goodwin, and M'r Robinson, did you act or vote with them in that action? State how that fact was.

107 (Objected to as assuming that it has been stated that the directors did vote to sell the stock, and because it calls for what should appear of record, if it exists.)

Ans. I did not vote with them.

Int. 23. State whether there was or was not a vote to sell passed by the directors.

(Objected to as calling for what should be matter of record.)

Ans. There was.

Int. 24. Did M'r Robinson or M'r Goodwin vote or act in the vote passed as directors?

(Objected to as calling for what should be matter of record.)

Ans. They did not.

Cross-examination resumed:

Cross-int. 41 (de bene). Did the directors vote to sell the stock at a regular or stated meeting of the board?

Ans. They did, all but these purchasers; they did not vote.

Cross-int. 42. And you mean to be understood to say that that vote was passed at a regular or stated meeting of the board, do you?

Ans. Yes, sir.

Cross-int. 43. Was it propounded to the board in writing or orally?

Ans. I should say orally, but I am not positive. I think orally, but I can't say positively.

Cross-int. 44. Will you say that Walter Hastings or M'r Cotting or M'r Pierce or M'r Curtis or M'r Proctor—was either, and which of them, present at that meeting?

Ans. My impression is that M'r Hastings, M'r Proctor, and M'r Curtis were there. My impression is the other two men were not directors at the time; I can't say positively—especially M'r Pierce, I am quite sure, was not a director.

Cross-int. 45. And that is the meeting that you have spoken of as taking place between the last of August and the 8th of Sept. 1868, is it not?

Ans. Yes.

JOSEPH H. WHITE.

108 *Deposition of Francis Harrington.*

APRIL 5, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. What is your name, age, residence, and occupation?

Ans. My name is Francis Harrington; residence, Salem; age, 40; occupation, paying teller Eliot National Bank.

Int. 2. How long have you been paying teller or otherwise in the Eliot National Bank?

Ans. I've been in the Eliot Bank, I think, since January, 1854, and in the National since its formation.

Int. 3. Will you look at the paper now shown you, being Exhibit 21, and state in whose handwriting it is, and who made it out?

Ans. It is in my handwriting. I made it out.

Int. 4. At whose request, if any one's, was it made, and what did you do with it after it was made?

Ans. It was made at the request of M'r Demeritt, president of the bank. I handed it to him.

Int. 5. Had you any knowledge of it, or what was done with it afterwards?

Ans. No; I had not.

Int. 6. Will you look at the item credit in that account, Exhibit 21,

and state of what it is made up, and from what source, and how the cash was received?

(Objected to as incompetent.)

Ans. It is made up of the interest on the loan and the original loan and the assessments. The cash was received by the three notes, I think; I can't say positively.

Int. 7. Notes given for what?

Ans. Notes given to pay the loan, principal, and interest, and assessments.

Int. 8. Had you anything to do with the sale of the four hundred and fifty shares of Hecla stock to M'r Robinson, M'r Goodwin, and M'r White?

Ans. I had nothing to do with it.

109 Int. 9. Had you, at the time, knowledge that the stock was sold and transferred?

Ans. I understood that the stock was taken by three of the directors.

Int. 10. What notes do you refer to as furnishing the cash which constitutes the credit in that account?

Ans. Notes given by the three directors.

Int. 11. Given by the three directors for what?

Ans. To pay for the stock.

Int. 12. At the time you made up that account, do you recollect whether the cashier was there or away?

Ans. He was away.

Int. 13. Will you look at paper now shown you, being Exhibit 6, and state in whose handwriting that is?

Ans. That is in my handwriting.

Int. 14. Do you recollect when, at whose request, or under what circumstances you wrote that?

Ans. It was made at the request of M'r Demeritt, the president of the bank.

Int. 15. Did you personally deliver, or see any one deliver, either of the papers shown you, being Exhibit 21 and Exhibit 6, to Charles L. Hayward?

Ans. I saw no one deliver them, and I did not deliver them myself.

Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. When did M'r Demeritt request you to make the paper, Exhibit 6, which you have spoken of?

Ans. I can't say, positively; I think it must have been either Sept. 7 or 8, 1868.

Cross-int. 2. You say that identical paper, Exhibit 6, is your handwriting?

Ans. Yes, sir.

Cross-int. 3. Do you mean to say that that paper was not made within the last six weeks, and that it is not a copy of an original paper now or recently in the bank?

Ans. I mean to say this is the original paper which I made out some time in Sept. 1868, though I will not swear positively as to

110 the day. This is the original paper. On referring to this, I see this is a copy. I have marked it copy, in a corner, in my handwriting.

Cross-int. 4. When did you last see M'r Demeritt?

Ans. I think on Monday or Tuesday of this week.

Cross-int. 5. As that paper, Exhibit 6 has been among the exhibits

in this case some time, do you now mean to say that you made it at the request of M'r Demeritt ?

Ans. I made a paper like this, at the request of M'r Demeritt, of which this is a copy.

Cross-int. 6. At whose request did you make this paper, Exhibit 6?

Ans. I made this at the request of M'r Conant. It is a copy of an original.

FRANCIS HARRINGTON.

Deposition of William H. Goodwin.

APRIL 5, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant.

Int. 1. You have given your testimony already in this case, haven't you ?

Ans. Yes, sir.

Int. 2. Can you state who the directors of the Eliot National Bank were in August and September, 1868 ?

(Objected to, as it is a matter of record.)

Ans. I can exactly, by consulting the records of the bank, but to the best of my recollection now they were Mess'rs Demeritt, Robinson, Curtis, Hastings, White, Proctor, Tilton, and myself.

Int. 3. Will you please produce the records showing who the officers were, elected at the last election next preceding Sept. 8, 1868, including all records of subsequent resignations and other elections during that time, and also have copies made of the same, to be annexed to this deposition ?

Ans. I will.

111 Int. 4. Will you state whether you were present at the meeting of the directors held Aug. 17, 1868, the time the vote was passed ?

Ans. I think I was. The record will show.

Int. 5. Between that time and the 8th of September, had you any interview with M'r Hayward, the complainant ?

Ans. No, sir.

Int. 6. Will you state, as near as you can, when the first proposition was made by you, M'r Robinson, and M'r White, to buy the 450 shares of Hecla mining stock, pledged by M'r Hayward to the bank ?

Ans. On the 7th of September, 1868, as near as I remember.

Int. 7. Will you state what you know about M'r Hayward being asked to pay his debt, or a portion of it, and redeem the stock himself, between Aug. 17 and Sept. 8, 1868 ?

Ans. I know that he was notified by the bank that a vote was passed to that effect. I never spoke to him.

Int. 8. If any report was made officially to the board of directors by any one, state what it was, and who made it.

(Objected to.)

Ans. M'r Demeritt reported that he had seen M'r Hayward, who represented to him that he was unable to redeem his stock, or pay anything on account of the loan; that the bank must look to the proceeds of the stock for its payment of the loan.

Int. 9. Will you state what occurred then, in regard to any sale of it, between the directors ?

(Objected to.)

Ans. The directors then, those three, agreed to buy the stock at a price which would pay M'r Hayward's loan, including interest and as-

sessments on it. I wish to state here that my share was in connection with M'r J. G. Weld.

Int. 10. State what was done then in relation to it, or in relation to seeing M'r Hayward or communicating the proposition to him.

(Objected to.)

Ans. M'r Demeritt went out for the purpose of consulting M'r Hayward on the subject of the sale, and reported on his return that he approved of it, and sanctioned it.

Int. 11. How many shares of the stock did you and M'r Weld purchase?

112 Ans. 150.

Int. 12. To whom did M'r Demeritt report after going to see M'r Hayward in relation to selling the stock to the three directors, as proposed?

(Objected to.)

Ans. I can't remember what directors were present on his return, but as they came in the following day or the following meeting, the sale was brought to their notice, and received their sanction.

Int. 13. Was there any vote of the directors directing or authorizing the sale of this stock to you and the two other gentlemen?

(Objected to.)

Ans. There was.

Int. 14. In the passing of that vote, did you or M'r Robinson or M'r White act as directors on the part of the bank?

(Objected to.)

Ans. We did not vote.

Int. 15. Was the sale made to you, M'r Robinson, and M'r White, with or without the assent and direction of the other directors?

(Objected to.)

Ans. Those present assented to it.

Int. 16. Have any of the directors died since; any one who was director at that time; if so, which one?

Ans. Stephen Tilton.

Int. 17. Do you recollect whether any one of the directors at that time was here or abroad?

Ans. M'r Hastings was abroad, as I remember.

Int. 18. Did you know anything about rendering the account to M'r Hayward of the sale after it had been made and completed?

Ans. I remember a statement was made and given to M'r Demeritt to hand to M'r Hayward.

Int. 19. After the sale of that stock, who received and had and enjoyed the dividends in stock and cash up to this time?

Ans. I did, on 150 shares.

Int. 20. Has the bank ever had or claimed, to your knowledge, any interest in the stock since, or any dividends?

Ans. None whatever.

Int. 21. Did you know anything about a supplementary state-

113 ment, or a question about a balance still due from M'r Hayward, some 60-odd dollars, after the sale had been made?

Ans. I did.

Int. 22. What did you know of it?

Ans. The account in which the proceeds of the sale of stock were applied was made reckoning interest at 6 per cent. M'r Hayward had an understanding that he should pay 7 per cent. That difference between 6 and 7 per cent. was charged to him. There was at the same

time to his credit the proceeds of some other sales of bonds, I think, leaving a balance of 60 or 70 dollars due the bank.

Int. 23. Did you know anything about a claim being made on Hayward, or his promising to pay that?

Ans. M'r Demeritt stated that he showed this account to M'r Hayward, and he promised to pay the bank when he was able.

(Ans. objected to.)

Int. 24. How did the price which you then agreed to pay, and did pay for the stock, compare with the then market value of the stock?

Ans. I think it was the full market value.

Int. 25. More or less?

Ans. More, if anything.

Int. 26. Do you recollect how the market was at that time; whether fluctuating, uncertain, or firm?

Ans. I think it fluctuated; in fact, 400 or 500 shares offered in the market might depress the price 5 or 10 dollars; and if one wished to buy that number of shares, he might be compelled to pay 5 or 10 dollars more than the quotation.

Int. 27. From the time that stock was sold by the bank to the parties, did you ever know of any complaints of M'r Hayward about it, or of his making any objection to the sale?

Ans. I never heard that he was not satisfied until the bank received a letter from Mess'rs Hodges and Barrett.

Int. 28. What letter do you refer to, and when was it received?

Ans. I think it was in March, 1872.

Int. 29. During that period, do you know of M'r Hayward's making any claim upon the stock, or taking or showing any interest, or taking any steps about his previous loan from the bank?

Ans. I never knew or heard of his doing so.

114 Int. 30. Did you know M'r Hayward?

Ans. I knew him by sight. I never spoke to him.

Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. In answer to the seventh direct interrogatory, you say that M'r Hayward was notified by the bank that a vote was passed to that effect. Did you ever give him any notice, or yourself mail notice, to that effect, or ever speak to him to that effect?

Ans. Never, personally.

Cross-int. 2 (de bene). In answer to the tenth interrogatory, you say that M'r Demeritt reported certain matters to the board of directors. (Tenth interrogatory and answer read to witness.) Now, what was the date of the meeting at which the statement therein referred to was made?

Ans. It was first made on the 7th of September, as near as I recollect, and afterwards at another meeting of the directors, whether the following day or the following Monday I can't say. This was probably repeated many times informally.

(Answer after the words "This was probably" objected to as not responsive.)

Cross-int. 3. You took this stock on the 8th of September, 1868, and then gave your note for it, did you not?

Ans. Yes, sir.

Cross-int. 4. Did M'r Demeritt make the statement referred to at a meeting held after the 8th of September, 1868?

Ans. He might have repeated it to those who were not present.

Cross int. 5. Did you ever hear him repeat it at any other meeting than the 8th of September?

Ans. I think I have.

Cross int. 6. In whose presence? Name them.

Ans. I can't state.

Cross int. 7. Was the bargain all made before M'r Demeritt went out to communicate with M'r Hayward?

Ans. It was, subject to his approval. M'r Demeritt returned and said he approved of it.

Cross int. 8. Were the votes made before he went out?

Ans. I think not.

Cross int. 9. Was M'r Weld present at the time?

115 Ans. I don't think M'r Weld came into the bank in reference to the matter.

Cross int. 10. Was there ever passed by the board of directors a vote that was recorded sanctioning that sale?

Ans. I don't think there was.

Cross int. 11. Was there ever a vote passed not recorded sanctioning that sale?

Ans. I think there was.

Cross int. 12. When was that vote passed?

Ans. I can't state the day, but soon after the sale.

Cross int. 13. How soon after: within one week, one month, or one year?

Ans. To the best of my recollection within a few days.

Cross int. 14. Was that vote passed at a regular meeting of the board of directors?

Ans. I think it was. We consider that any meeting when a quorum is present is a regular meeting to transact business.

(Answer objected to after the words "We consider.")

Cross int. 15. Will you swear that the board of directors, at a meeting held within one month from the 8th of Sept., 1868, at which meeting a quorum of the board was present, not including yourself and Mess'rs Robinson and White, passed a vote sanctioning an unqualified and unconditional sale of that stock to you three gentlemen?

Ans. I can to the best of my recollection say that every director sanctioned and approved of the sale, except M'r Hastings, who was absent, and excepting the purchasers of course.

Cross int. 16. You do not say that that sanction was expressed by a vote passed at a meeting of the board, at which a quorum was present (exclusive of the purchasers). Do you mean to say that such sanction was or was not expressed by such a vote?

Ans. I think it was.

Cross int. 17. Will you swear that it was?

Ans. To the best of my recollection.

Cross int. 18. Did you hear M'r Curtis sanction that sale prior to the 11th of March, 1869?

Ans. I think I did.

Cross int. 19. Where?

116 Ans. At the bank.

Cross int. 20. In whose presence?

Ans. I can't say. It might have been the other directors.

Cross int. 21. Have you any recollection of it whatever?

Ans. I recollect that the sale was sanctioned by the directors.

Cross int. 22. And is it that general recollection that the sale was

sanctioned by the directors when you say you think M'r Curtis sanctioned it?

Ans. Yes, sir.

Cross-int. 23. Was there ever any sanction by the directors of any conditional sale of that stock?

(Objected to as assuming that there was a conditional sale.)

Ans. Not to my knowledge.

Cross-int. 24. Did you not bargain with M'r Weld for a conditional purchase of that stock by him? I ask a specific answer—yes or no.

Ans. Our purchase of the bank was made without any condition. I had an understanding with M'r Weld about his interest in it.

(Answer objected to as not responsive.)

Cross-int. 25. In answer to the 18th interrogatory you say, "I remember a statement was made, and given to M'r Demeritt to hand to M'r Hayward." Did you see that statement at the time?

Ans. I saw the substance of it, but did not see the statement that M'r Harrington drew off in detail.

Cross-int. 26. Where did you see the substance of it: in the items in the books of the bank, or in a collected form as they appear in the statement?

Ans. In a collected form, as drawn by M'r Harrington.

Cross-int. 27. Is Exhibit C, now shown you, a copy of that collected form of statement you speak of?

Ans. It is.

Cross-int. 28. Referring to the matter of 60 or 70 dollars mentioned in your answers to the 21st and 22d direct questions, how do you know that M'r Hayward had an understanding that he should pay 7 per cent.?

Ans. It was stated that he agreed to pay the rate of interest the bank charged other customers, which was 7 per cent. The loan
117 was made by M'r Demeritt, and I understood from him that it was the rate of interest he was to pay. That's all.

Cross-int. 29. You saw the paper made by M'r Harrington, of which Exhibit 6 is a copy, at or about the time it was made, did you not?

Ans. I did.

Cross-int. 30. When did it first occur to you that there was any balance of 60 or 70 dollars due from M'r Hayward?

Ans. I can't remember.

Cross-int. 31. When you made the bargain for the stock, what were you to pay for it: a sum fixed in an aggregated sum, or a defined price per share?

Ans. We were to pay in the aggregate enough to pay off M'r Hayward's loan, as made out by M'r Harrington's figures. The stock had been in the bank a long time. This was the first moment when we could see a way to get enough for it for the bank to come off without losing money. The bank examiner had seen it there and complained of it as being insufficient, and the directors all felt very desirous to get clear of it and get it out of the bank.

(Answer objected to, all after the words "The stock had been," etc.)

Cross-int. 32. Was there not some difference about the price at which that stock was to be taken, and did you not insist that you were to have it for 82 or 83, or some price less than the sum for which you gave your notes?

Ans. There was a mistake in the figures when we first negotiated for it. We afterwards decided to take it at the price shown by the corrected figures.

Cross-int. 33. Who made the mistake in the figures?

Ans. I think M'r Harrington.

Cross-int. 34. What was the mistake?

Ans. He either left out some item of interest or an assessment; just what I can't tell.

Cross int. 35. In answer to the 27th direct question, you have referred to a letter received by the bank from Mess'rs Hodges and Barrett, about the 11th of March, '72. Did the bank ever receive a letter from Mess'rs Hodges and Barrett?

Ans. I think the letter referred to was signed Cha's L. Hayward.

(Adjourned.)

118 APRIL 14, 1873.

Direct examination resumed:

Int. 31. Will you state what occasion the bank had to sell the stock of M'r Hayward in question, and what circumstances or reasons existed why it should be sold, if any?

(Objected to as out of time, among other things.)

Ans. It was directed to be sold for the purpose of paying M'r Hayward's loan, he having stated that the bank must rely on the sale of that stock for its repayment.

Int. 32. In your cross-examination you have spoken about the bank examiner complaining; state how that was in fact.

Ans. When the bank had been examined, from time to time, the examiner had complained of having copper stocks as security for any loan. He considered them worthless.

(Objected to as hearsay.)

Int. 33. You have stated in your cross examination about the bank or its clerk having discovered an error in the figures showing M'r Hayward's indebtedness; state how that occurred, at what stage of the negotiation this thing occurred, and what was said and done at the time.

(Objected to.)

Ans. My answer to that would be, in the main, the same as M'r Robinson's, whom I have just heard, in reply to the third question. On or about the 7th of September, 1868, we negotiated to take the 450 shares of stock at a price which would repay the Hayward loan to the bank. The statement then presented would make the stock cost a few dollars less than we afterwards paid. When we made the offer, M'r Demeritt left the bank for the purpose of seeing M'r Hayward, to get his sanction and approval. He returned and said that he could do nothing himself, and would be glad to have him sell the stock and repay the loan. When the account was drawn off, which was rendered to M'r Hayward either that day or the following, there was found to have been an omission of some item of interest or assessment. The stock would really cost us a few dollars more than we supposed. I hesitated somewhat then about paying the excess, claiming I had a right to take it at the first figures produced; that I thought it would be a little more than the market value. As the others took theirs, I finally decided to take my

119 part. When the stock was transferred and the note given, M'r Demeritt said I had made a good bargain, and, if I were sick of the trade, I might within six months return it and he would take it off my hands. I did not return it, never regarding that remark as binding; and the bank never had any right or interest in the stock after it was transferred to me.

(Objected to so far as it relates hearsay testimony.)

Int. 34. How was this remark of M'r Demeritt made; in wha' way or manner?

Ans. He made the remark just as I was going out of the bank with the certificate.

Cross examination resumed:

Cross int. 36. Was nothing said about taking that stock off your hands, or your right to return the stock, before you received the certificate?

Ans. Not to my recollection.

Cross-int. 37. Do you swear you don't recollect that that remark was made before you gave your note?

Ans. As I remember, it was made at the time I gave the note and received the stock.

Cross int. 38. Did you not report that remark to M'r Weld at the time he indorsed the note for you?

Ans. I can't remember that I did. I reported it to him some time.

Cross-int. 39. When you say you found this stock would cost a few dollars more than you originally bargained for, do you mean a few dollars a share more?

Ans. I do.

Cross int. 40. Did you ever speak to M'r Hayward upon the subject of this stock?

Ans. I never did personally.

Cross-int. 41. Did you ever see the account drawn off expressing M'r Hayward's indebtedness, on account of the loan made, and the assessments paid by the bank upon this stock?

Ans. I have seen it produced here.

Cross-int. 42. Never saw it before?

Ans. I saw the substance of it the day of the sale, or the day after—the 7th or 8th of Sept., 1868.

120 Witness states: I have and do hereby produce the records inquired of in direct interrogatory No. 3, and I also produce a copy to be annexed to this deposition. There were no resignations.

(Copy produced and marked "Exhibit 22, E. T. N., Examiner.")

W'M H. GOODWIN.

Deposition of John P. Robinson.

APRIL 14, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. State whether or not you are the John P. Robinson who has been examined in this case in behalf of the complainant.

Ans. I am.

Int. 2. Were you present at a meeting of the directors of defendant bank in August, 1868, at the time of the passing of the recorded vote in relation to the loan of M'r Hayward's and the Hecla stock in question in this suit?

Ans. I was.

Int. 3. State when and under what circumstances the sale of the said Hecla stock to yourself and M'r Goodwin and M'r White was proposed, and what was said and done about it at that time, and give the history of the transaction from that time to the time of the actual transfer of the stock by the bank to you and them.

(Objected to unless the witness speaks of a recorded vote.)

Ans. After the passage of that recorded vote it was reported by M'r Demeritt to the bank that M'r Hayward could not make the payments, and that he would have to sell the stock. He thought this stock would bring nearly enough to pay the loan, or quite; that M'r Hayward could not in any way raise the money that the vote required. It was then discussed whether it would be well to try to sell it at auction. It was contended that so large an amount put into the market at one time would reduce the price. M'r Demeritt being anxious to have it sold, as well as all the directors, the bank commissioner having complained that we had that class of securities in the bank, M'r White, I think, some one at least, inquired how much per share would pay the debt to the bank. The reply was, eighty-two or eighty-three dol-
121 lars, or somewhere thereabouts; the interest was not made up. M'r White said he would buy one third or one-half. It was finally agreed that he would take one-third, M'r Goodwin one-third, and myself one-third, at the price which we then supposed would pay the loan. After we had said that we would take it, it was held in abeyance for a time, that M'r Demeritt might see M'r Hayward and report to us his wishes. I think that this conversation took place the 7th of September, 1868. The question had been discussed in regard to the selling of the stock before, but I think it was not proposed that I or the other parties should be the purchasers until that time. Some time after we proposed to purchase it—I think the next day, although it might have been the same day—M'r Demeritt reported that he had seen M'r Hayward and he would be glad to have us purchase it, or anybody else that would relieve him from his indebtedness to the bank. It was thereupon agreed that we were to be the purchasers, or that we should purchase it, and for the amount of purchase-money the bank would take our notes with approved indorsers at six months, bearing interest at 6 per cent. per annum. When the interest was figured up and the notes given I found that the amount was somewhat larger than had been represented. I made some complaint and hesitation in consequence of its being larger. M'r White or M'r Demeritt, and I think both, said I was so large a stockholder that for the sake of getting it out of the bank I ought not to object. They believed that it would be a good purchase, and M'r White, in fact they both, said if I bought it and was sick of it they would take it off of my hands. I told them that what I lost by paying an over price I might as a stockholder save by the bank's getting its pay, and I would take it. The stock was transferred; I gave my note, with John M. B. Reynolds as an indorser.

(Counsel for complainant objects to all parts of the answer reporting the statements of other people, and anything done or said in the absence of M'r Hayward.)

Int. 4. What did you know afterwards, or at any time, about any sum, or further sum or balance, being found due from M'r Hayward, and what occurred or was said on that subject?

(Objected to, if calling for anything except what the witness heard M'r Hayward say.)

Ans. When in the bank soon after, perhaps same days after the
122 purchase was made, I was told, either by the president or one of the clerks, or by both, that some error, amounting to some sixty dollars or more, in the item of interest, had been made, and that M'r Hayward had said that if he was ever able he would pay that balance to the bank.

(Objected to by counsel for complainant.)

Cross-examination by E. F. Hodges, esq., of counsel for complainant:

(Counsel for complainant, not waiving, but insisting upon his objections to the questions and answers heretofore put to and answered by the witness, puts the following cross-interrogatories, de bene esse:)

Cross-int. 1. In your answer to the second direct interrogatory, do you refer to the note mentioned in the answer in this case, and bearing date the 17th of August, 1868?

Ans. I do.

Cross-int. 2. In making your answers this afternoon, you have held in your hand and referred to a written paper or memorandum. Please state what that is.

Ans. That was the question the examiner read to me. I asked the examiner to let me make it, it being long, to see if I gave a full answer.

Cross-int. 3. Did you aid in preparing the answer to this bill?

Ans. No, sir. I never saw the answer. I had conversations with counsel at various times, but did not see the answer that he made.

Cross-int. 4. Did you not communicate your knowledge of the transactions involved in this suit to the counsel for the bank, to aid him in preparing the answer?

Ans. I had conversation with the counsel in regard to the facts in the case.

Cross int. 5. (Question repeated.)

Ans. (Answer repeated.) He would, of course, make such use of the facts I had communicated as he thought proper.

Cross-int. 6. Was there any discussion, after the 17th of August, at any meeting of the board of directors, concerning the sale of this stock until the 7th of September, 1868?

Ans. There was conversation in regard to it almost daily, when I was in the bank, with the president or some of the directors.

(Objected to as not responsive.)

123 Cross-int. 7. Was there a sum fixed in the discussions of the 7th of September at which the stock was to be taken, or was it to be taken for the amount of the loan, and the assessments upon it, and interest?

Ans. It was understood that we were to take it for the amount of the loan, assessments, and interest; but it was also understood that that amount would be two or three or four dollars a share less than we finally paid for it.

Direct examination resumed:

Int. 5. You say in your answer to third question that M'r White or Demeritt said if you were sick of the purchase they would take it off your hands, or that in substance. Was any time named in which M'r White or Demeritt said they would take it off your hands in that event?

Ans. I don't think there was. I considered that more to strengthen me to carry out the purchase than anything obligatory on their part.

Int. 6. Did you afterwards, at any time, rely or act upon it as a promise or obligation on their part?

(Objected to.)

Ans. I did not.

Int. 7. As a matter of fact, how did the stock run afterwards in the market, as compared with the price you paid for it?

Ans. It was bought by a friend of mine about twelve months after at about $10 a share less than I paid. The exact state of the market from time to time I am unable to tell now.

(Answer objected to by counsel for complainant so far as it relates to the purchase by the witness's friend.)

Int. 8. When you say you communicated the facts of the case to the counsel for the bank, with a view of making the answer, did you do so with or without conference with other directors of the bank; and if with any of them, with which one of them?

(Objected to.)

Ans. It was with M'r Demeritt, and I think, in fact I know, that M'r Goodwin has been present when I have had conversations with him.

JOHN P. ROBINSON.

124 *Deposition of Royal B. Conant.*

APRIL 15, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. Please state whether you are the M'r Conant, the cashier of the bank, who has given his testimony before in the case for the complainant.

Ans. I am.

Int. 2. Will you be kind enough to state and produce a detailed statement of the account kept by M'r Hayward, the complainant, at your bank after the loans in question were negotiated by him with the bank?

(Objected to unless the witness produces the original books containing the account.)

Ans. I have a copy made from the original account, which I now produce.

(Produced and marked "Exhibit 23, E. T. N., Examiner.")

Int. 3. Will you state, as a matter of fact, how long M'r Hayward continued to deposit with the bank after the said loans were negotiated?

Ans. To the ordinary extent during the months of October, November, and December following. One or two entries in January of '67; and after that the account ceased to be active. He ceased to deposit.

(No cross-examination.)

R. B. CONANT.

Deposition of Charles W. Seabury.

APRIL 15, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. State whether you have given your testimony before in this case for the complainant.

Ans. I have.

Int. 2. Will you state what mining companies were joined in the consoildation and which formed the company now known as the Calumet & Hecla Mining Company?

125 Ans. Calumet Mining Company, Hecla Mining Company, Portland Copper Company, and Scott Copper Company.

Int. 3. At what date was that consolidation effected and completed?

Ans. May 1, 1871.

Int. 4. Where were those companies located prior to the consolidation?

Ans. Upper Peninsula, in Michigan, Houghton County.

Int. 5. What was the capital stock of each of the separate companies before consolidation, and what was the capital stock of the Calumet and Hecla Company after consolidation?

Ans. The capital stock of the Calumet Mining Company was $300,000 actually paid in; Hecla, $500,000 actually paid in; the Scott and Portland, each, $200,000. Total, $1,200,000. The latter sum was the capital stock of the Calumet & Hecla Company.

Int. 6. In the consolidation, what was done with the properties of the respective companies which formed it?

Ans. Deeded to the & Calumet Hecla Mining Company.

Int. 7. Did the capital stock of the Calumet & Hecla Mining Company consist of the aggregate capital stock of each of the other companies named?

Ans. It did.

Int. 8. How were the shares in the consolidated company distributed?

Ans. At the date of consolidation each stockholder in the old Calumet Company and the old Hecla Company, respectively, surrendered their certificates of stock and took stock-certificates of the new company, share for share. The stock of the Scott and Portland companies was issued to the stockholders of the Calumet & Hecla Mining Company in four quarterly installments.

Int. 9. Have you the act passed by the legislature of the State of Michigan under which the consolidation was made and had? If so, will you annex the same as an exhibit?

Ans. I have a copy of it, dated Jan. 31, 1871, approved Jan. 27, 1871. Great seal affixed Jan. 31, 1871. I have only one copy and do not wish to part with it.

(It is agreed by counsel that the act may be referred to by either party.)

No cross-examination.

CHAS. W. SEABURY.

126 *Deposition of John Demeritt.*

Direct examination by A. A. Ranney, esq., of counsel for defendant.

APRIL 15, 1873.

Int. 1. What is your name, age, residence, and occupation?

Ans. John Demeritt; between fifty and sixty; Boston; president of Eliot Bank for about nine years.

Int. 2. State when you ceased to be president of the bank.

Ans. The 13th of January last.

Int. 3. Do you know the complainant in this case, Charles L Hayward?

Ans. I do.

Int. 4. How long have you known him, and in what relations?

Ans. I knew him a depositor at the Eliot Bank about eighteen years ago.

Int. 5. State whether or not you negotiated with him or had anything to do with him in the negotiations of the loan made to him by the bank for which he pledged 450 shares in the Helca Mining Company, in question in this suit?

Ans. I loaned him $20,000.

Int. 6. State under what circumstances and what representations, if any, on the part of M'r Hayward, you made the negotiations.

Ans. He gave me his check for it, and told me he'd make it good the next day.

Int. 7. What did he say, if anything, about the stock?

(Answer objected to by counsel for complainant so far as it relates to the purchase by the witness's friend.)

Int. 8. When you say you communicated the facts of the case to the counsel for the bank, with a view of making the answer, did you do so with or without conference with other directors of the bank; and if with any of them, with which one of them?

(Objected to.)

Ans. It was with M'r Demeritt, and I think, in fact I know, that M'r Goodwin has been present when I have had conversations with him.

JOHN P. ROBINSON.

124 *Deposition of Royal B. Conant.*

APRIL 15, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. Please state whether you are the M'r Conant, the cashier of the bank, who has given his testimony before in the case for the complainant.

Ans. I am.

Int. 2. Will you be kind enough to state and produce a detailed statement of the account kept by M'r Hayward, the complainant, at your bank after the loans in question were negotiated by him with the bank?

(Objected to unless the witness produces the original books containing the account.)

Ans. I have a copy made from the original account, which I now produce.

(Produced and marked "Exhibit 23, E. T. N., Examiner.")

Int. 3. Will you state, as a matter of fact, how long M'r Hayward continued to deposit with the bank after the said loans were negotiated?

Ans. To the ordinary extent during the months of October, November, and December following. One or two entries in January of '67; and after that the account ceased to be active. He ceased to deposit.

(No cross-examination.)

R. B. CONANT.

Deposition of Charles W. Seabury.

APRIL 15, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. State whether you have given your testimony before in this case for the complainant.

Ans. I have.

Int. 2. Will you state what mining companies were joined in the consoildation and which formed the company now known as the Calumet & Hecla Mining Company?

125 Ans. Calumet Mining Company, Hecla Mining Company, Portland Copper Company, and Scott Copper Company.

Int. 3. At what date was that consolidation effected and completed?

Ans. May 1, 1871.

Int. 4. Where were those companies located prior to the consolidation?

Ans. Upper Peninsula, in Michigan, Houghton County.

Int. 5. What was the capital stock of each of the separate companies before consolidation, and what was the capital stock of the Calumet and Hecla Company after consolidation?

Ans. The capital stock of the Calumet Mining Company was $300,000 actually paid in; Hecla, $500,000 actually paid in; the Scott and Portland, each, $200,000. Total, $1,200,000. The latter sum was the capital stock of the Calumet & Hecla Company.

Int. 6. In the consolidation, what was done with the properties of the respective companies which formed it?

Ans. Deeded to the & Calumet Hecla Mining Company.

Int. 7. Did the capital stock of the Calumet & Hecla Mining Company consist of the aggregate capital stock of each of the other companies named?

Ans. It did.

Int. 8. How were the shares in the consolidated company distributed?

Ans. At the date of consolidation each stockholder in the old Calumet Company and the old Hecla Company, respectively, surrendered their certificates of stock and took stock-certificates of the new company, share for share. The stock of the Scott and Portland companies was issued to the stockholders of the Calumet & Hecla Mining Company in four quarterly installments.

Int. 9. Have you the act passed by the legislature of the State of Michigan under which the consolidation was made and had? If so, will you annex the same as an exhibit?

Ans. I have a copy of it, dated Jan. 31, 1871, approved Jan. 27, 1871. Great seal affixed Jan. 31, 1871. I have only one copy and do not wish to part with it.

(It is agreed by counsel that the act may be referred to by either party.)

No cross-examination.

CHAS. W. SEABURY.

126 *Deposition of John Demeritt.*

Direct examination by A. A. Ranney, esq., of counsel for defendant.

APRIL 15, 1873.

Int. 1. What is your name, age, residence, and occupation?

Ans. John Demeritt; between fifty and sixty; Boston; president of Eliot Bank for about nine years.

Int. 2. State when you ceased to be president of the bank.

Ans. The 13th of January last.

Int. 3. Do you know the complainant in this case, Charles L Hayward?

Ans. I do.

Int. 4. How long have you known him, and in what relations?

Ans. I knew him a depositor at the Eliot Bank about eighteen years ago.

Int. 5. State whether or not you negotiated with him or had anything to do with him in the negotiations of the loan made to him by the bank for which he pledged 450 shares in the Helca Mining Company, in question in this suit?

Ans. I loaned him $20,000.

Int. 6. State under what circumstances and what representations, if any, on the part of Mr Hayward, you made the negotiations.

Ans. He gave me his check for it, and told me he'd make it good the next day.

Int. 7. What did he say, if anything, about the stock?

Ans. He said he bought it for somebody else, who was out of town.

Int. 8. Is that all?

Ans. I think he said he lived in Beacon street.

Int. 9. Did he say what was going to be done the next day by that man in reference to the stock?

Ans. He said he should get his money, and his check would be good.

Int. 10. Did he repay the loan the next day, as agreed?

Ans. He did not.

Int. 11. What was done and said between you and him between
127 that time and Aug. 17, 1868, in regard to getting him to repay the loan, or in relation to his paying it or being able to pay it?

Ans. I had quite a number of conversations with him. He said the stock had fallen in value very much and he wasn't able to pay at that time. I think that was the first conversation. He thought he should be able to pay when I first talked with him, and he promised to pay. I dunned him for the interest pretty sharp. I think the first six months' interest was paid. He promised to pay, if he could, the principal, with interest upon it, but he never did.

Int. 12. How often did you see and urge him to repay the loan and redeem the stock between that time and Aug. 17, 1868?

Ans. Pretty often.

Int. 13. After the passing of the vote of Aug. 17, 1868, whereby he was required to pay within a given time the sum specified therein, and if he did not, instructing you to sell the stock, did you see him in relation to his paying then as required by the vote?

Ans. There was a written authority to sell the stock before then. I did.

Int. 14. What did he say?

Ans. He couldn't pay then.

Int. 15. State all he said.

Ans. I asked him if he couldn't borrow some money of his brother. He said he couldn't then. I have seen him once or twice since before the sale to the directors.

Int. 16. At any of these times when you saw him was anything said about his paying part, and the bank helping him carry it, if he would do it?

Ans. I suggested that to him. If he'd pay part there was no question but what I could get the bank to carry it for him.

Int. 17. What did he say to it?

Ans. I think he said once he would try and see what he could do.

Int. 18. After that did he report whether he was able to do it or not; if so, what did he report?

Ans. I think he told me that being copper stocks he thought he shouldn't be able to do it.

Int. 19. When you saw him after the vote of Aug. 17, '68, and he told you he was unable to comply with the requirements of the direct-
128 ors, and before the time when the directors proposed to buy it, what did he say, if anything, about the bank selling the stock?

(Objected to as assuming that the witness has stated what has not been stated.)

Ans. He assented to the sale.

Int. 20. Did you report to the directors, after the vote of Aug. 17 was passed, and you had had the interview with M'r Hayward, what he said about his inability to pay the money as required and what he said about it, as you stated it?

Ans. Yes, I did.

Int. 21. After the proposition was made on the part of three of the directors, M'r Robinson, M'r White, and M'r Goodwin, to buy the stock, did you then see M'r Hayward in relation to it?

(Objected to as assuming that it has been proved by the witness that a proposition was made by Mess'rs White, Robinson, and Goodwin to buy the stock.)

Ans. I did.

Int. 22. Will you state whether, as a matter of fact, there was a proposition to buy on the part of the three said directors; and, if so, whether it was first made by them or suggested by you?

Ans. It was suggested by some one of them; M'r White, I think.

Int. 23. Was that before or after the time when M'r Hayward expressed his inability to pay after the vote of Aug. 17, 1868, was passed and you had had the interview with him?

Ans. It was after.

Int. 24. If after that proposition was made you saw M'r Hayward and had an interview with him about it, state what you said to him or he to you in relation to it.

Ans. After the proposition I called on him and told him I thought I could sell it to those gentlemen.

Int. 25. What did he say to it?

Ans. He assented to it. He didn't object to it.

Int. 26. State, as near as you can, what he said to the proposition.

Ans. I couldn't state the precise words, but he gave an assent. He didn't object to it.

Int. 27. Did you report this interview to the directors or those who proposed to purchase?

129 Ans. I have no doubt that I did.

Int. 28. Will you please state what the sum or price was at which you were going to sell it, if you named any, to M'r Hayward at that time?

Ans. Amount of the debt.

Int. 29. Will you state whether you had an interview with him in relation to a balance of money that still remained due in a difference of interest after the transfer of the stock had been made to the directors named?

Ans. I don't think I saw M'r Hayward immediately after that.

Int. 30. If you had a talk with him in relation to his paying a balance of $60 or $70, being a difference of interest between 6 and 7 per cent., state what he said about paying it.

Ans. I had a talk, but when that was I can't fix the time. He didn't object to it when I talked with him.

Int. 31. What did he say about paying it, if anything, or when he would pay it?

Ans. Pay it when he could.

Int. 32. Do you recollect what that sum was? State as near as you recollect.

Ans. I think it was between $60 and $70.

Int. 33. Do you recollect of what it was made up?

Ans. I understood it was a matter of interest—a difference between 6 and 7 per cent.

Int. 34. Do you recollect who discovered the error or balance and gave it to you?

Ans. I think it was M'r Conant.

Int. 35. Did you explain to M'r Hayward at the time how it occurred?

Ans. I told him it was the difference between 6 and 7 per cent.

Int. 36. Will you look at Exhibit 21, produced by M'r Hayward, and state whether you delivered that to M'r Hayward?

Ans. I couldn't say that I did. I might; but I have no recollection of carrying this paper in.

Int. 37. Do you recollect how the Hecla stock was selling in the market at the time the loan was negotiated at the bank by M'r Hayward?

130 Ans. Between 60 and 70 dollars a share.

Int. 38. How soon did it decline in the market?

Ans. Pretty soon. I couldn't tell you exactly the time.

Int. 39. Do you recollect who got from M'r Hayward the written order authorizing the bank to sell the stock, a copy of which is annexed to the answer dated Nov. 9, 1867?

Ans. I think M'r Conant wrote it, and I think he took it in to M'r Hayward. I suggested it, and he took it in. I know he wrote it, for I saw him.

Int. 40. At the time when the three directors named first proposed or agreed to buy this stock in question, do you recollect what was the amount of the debt of M'r Hayward, or the amount or price which they were to pay for the stock?

Ans. I think it was about 85, or something over; that was my first impression was the amount that M'r Harrington named.

Int. 41. Do you recollec twho, at that time, figured up the amount?

Ans. M'r Harrington, I think, or one of the clerks.

Int. 42. Do you recollect anything of an error in the amount being discovered afterwards; that the amount was larger than the amount first stated when the directors first proposed to purchase?

Ans. I think there was something like 3 dollars a share, between 2 and 3. I wouldn't fix the exact amount.

Int. 43. You say that after the proposition was made by the three directors to buy the stock you saw M'r Hayward and told him of the proposition, and that he assented to it. Did you report that assent to the directors who purchased?

Ans. I did.

Int. 44. Did you report that matter before or after the stock was transferred, or they consented to take it?

Ans. Before.

Int. 45. (Counsel for defendant calls on the counsel for complainant to produce the original letter of which Exhibit 5 is a copy, and he produces it.)

(Produced and marked "Exhibit 24, E. T. N., Examiner.")

Int. 46. Will you look at the letter marked "Exhibit 24," now produced, and state who signed the words "John Demeritt, president," thereto?

Ans. I signed it.

131 Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. Who wrote the body of Exhibit 24?

Ans. I suppose it was M'r Ranney.

Cross-int. 2. Did you not commence the answer of the 43d question by the expression, "I did not understand that when the offer was made it was assented to"?

(Objected to, because what he did begin to say was written down and crossed out, and he did not say "assented to" in it. There was no such expression.)

Ans. I think it was.

Cross-int. 3. Do you mean to say, then, that you did not understand M'r Hayward to assent to that proposition?

Ans. I think he did.

Cross-int. 4. Where did you make to M'r Hayward any proposition to sell that stock, and when?

Ans. It was at his office.

Cross-int. 5. When?

Ans. It was on the day before the stock was conveyed, I think, or transferred.

Cross-int. 6. How long conversation did you have with him?

Ans. A few minutes.

Cross-int. 7. Did you tell him what sum it was proposed to sell the stock for?

Ans. I did, to pay the debt.

Cross-int. 8. What debt?

Ans. His indebtedness to the bank.

Cross-int. 9. On what?

Ans. The loan.

Cross-int. 10. What loan do you refer to?

Ans. I hadn't examined it particularly; a balance due to the bank.

Cross-int. 11. Did you refer to loans made on the Hecla stock and interest or to those loans and assessments paid by the bank, and interest?

Ans. I did, sir.

Cross-int. 12. Do you mean both those sums?

132 Ans. Yes, sir.

Cross-int 13. Did you tell M'r Hayward that you thought you could sell that stock to pay these loans and assessments and interest?

Ans. I did.

Cross-int. 14. Will you swear that you did not say to him you thought he'd better let you sell it, instead of saying you could sell it?

Ans. I told him I thought I could sell it.

Cross-int. 15. Did he tell you to try, and let him know the result?

Ans. I don't think he did. I don't recollect of it.

Cross-int. 16. When you left him on that occasion, did he understand that you proposed, without further notice to him, to sell his stock for an amount that would pay the loan made and the assessments paid by the bank upon the Hecla stock, and the interest thereon?

Ans. I think he did.

Cross-int. 17. Will you state what you said to him when you first went in—as nearly as you can the language you used?

Ans. I think I told him I thought I could sell his Hecla stock.

Cross-int. 18. Did you name any sum, or only refer to the indebtedness before him?

Ans. I didn't name any sum, because I told him enough to pay the indebtedness.

Cross-int. 19. You have said that M'r Hayward gave his check for $20,000. Where is that check?

Ans. I don't know.

Cross-int. 20. Did he, about that time, borrow another sum of $6,500 of the bank; and, if yea, what did he give for that—a check or note?

Ans. Check or a memorandum, or some other form.

Cross-int. 21. Did you ever see that check or memorandum?

Ans. I have.

Cross-int. 22. When did you last see that check or memorandum and the first-named check for $20,000?

Ans. I don't recollect. I couldn't tell you.

Cross-int. 23. Where did you last see them?

Ans. It was in the bank.

Cross-int. 24. Was it after Sept. 8, 1868?

Ans. I think it must have been.

133 Cross-int. 25. In whose possession were they when you last saw them?

Ans. I think that I had them.

Cross-int. 26. What did you do with them?

Ans. I think I put them in an envelope.

Cross-int. 27. Where did you put the envelope?

Ans. I thought I put it into a drawer.

Cross int. 28. Who handed them to you?

Ans. It must have been the cashier.

Cross-int. 29. For what purpose?

Ans. To examine, I suppose.

Cross-int. 30. Now, sir, will you swear that those checks or memoranda were not handed to you since March, 1872?

Ans. They might have been.

Cross-int. 31. Were they not handed to you with this view of aiding in preparing the defense in this suit?

Ans. I don't know but what they were. I think they were.

Cross-int. 32. Then, sir, you mean to say that those notes have been in your possession since the suit was begun, and were put in your possession by M'r Conant, the cashier?

Ans. I think they must have been.

Cross-int. 33. When you left M'r Hayward after your conversation with him on the 7th or the 8th of September, 1868, as you have testified, state what was done in reference to a sale of the stock, where it was done, and who was present?

(Objected to.)

Ans. I must have reported our conversation with M'r Hayward, my conversation. I stated to them M'r Hayward's assent to the sale.

Cross-int. 34. To whom did you state? Name them.

Ans. M'r White, M'r Goodwin, M'r Robinson, I think. I can't tell whether there was anybody else or not. I can look at the records. It is the only means of telling.

Cross-int. 35. What did they say?

Ans. I don't know as they made any particular—I don't recollect anything particularly that they said.

Cross-int. 36. They didn't, then, accede to the proposition to purchase the stock?

134 (Objected to.)

Ans. They purchased the stock.

(Objected to.)

Cross-int. 37. Will you state what they, or either of them, then said about purchasing that stock?

(Objected to.)

Ans. I think they thought it was no object to purchase it.

(Objected to.)

Cross-int. 38. What, then, was done about it if it was no object to purchase it? I want a full statement of what then took place.

(Objected to.)

Ans. I think nothing that day. On my return there was nothing done that day.

(Objected to.)

Cross-int. 39. What was done the next day, or when the notes were given by Mess'rs White, Robinson, and Goodwin, and certificates of stock given to them?

(Objected to.)

Ans. The bank received the notes, and they the certificates.

(Objected to.)

Cross-int. 40. If it was no object to purchase, how happened they to give the notes?

(Objected to.)

Ans. They had changed their minds.

(Objected to.)

Cross-int. 41. State what took place when the bargain was made under which they gave their notes, whenever that was. State it all.

(Objected to.)

Ans. The account was made out and handed to M'r Hayward, I suppose.

(Objected to.)

Cross-int. 42. The last question refers to and inquires of you what Mess'rs Goodwin, White, and Robinson said and did, and what you said and did concerning the sale of that stock to them, and taking their notes. Will you please state it fully?

(Objected to.)

135 Ans. It was such a while ago I can't remember all the particulars?

(Objected to.)

Cross int. 43. State them as fully as you can.

(Objected to.)

Ans. I think they could have the notes renewed if they saw fit. I think I told them so.

(Objected to.)

Cross-int. 44. Did you not tell them that the bank would take back that stock when the notes became due, if they wished it?

(Objected to.)

Ans. There was something of the kind said.

(Objected to.)

Cross-int. 45. Was not that the condition upon which they gave their notes?

(Objected to.)

Ans. I think that I told them that I'd take the stock back again. I might have told them so.

(Objected to.)

Cross-int. 46. Now, sir, did you not tell them that the bank would take back the stock and surrender the notes, and was not that the condition upon which they gave their notes?

(Objected to.)

Ans. I think I told them I'd take the stock back.

(Objected to.)

Cross-int. 47. (Question repeated.)

(Objected to the repetition.)

Ans. If the stock was returned I should give up the notes. That would be a matter of course.

(Objected to.)

Cross-int. 48. Will you answer this question: Was it not agreed before either of those gentlemen gave their notes that the bank would take back the stock and surrender the notes, or not demand pay for the notes, if they desired it? I ask a direct answer, yes or no.

(Objected to.)

Ans. Something to that effect.

(Objected to.)

Cross-int. 49. Did you transfer that stock?

136 (Objected to.)

Ans. The record must say that. I have not seen the books.

(Objected to.)

Cross-int. 50. Don't you know about it?

(Objected to.)

Ans. I think I have a memorandum about it in my pocket that M'r Conant gave me yesterday.

(Objected to by counsel for defendant.)

Cross-int. 51. Don't you remember whether you transferred that stock or not? And if you do, please state the fact.

(Objected to.)

Ans. I did not.

(Objected to.)

Cross-int. 52. Why did you not?

(Objected to.)

Ans. I suppose they were among M'r Conant's collaterals, and I have never been in the habit of taking any of them or changing them. I suppose that is the reason.

(Objected to by counsel for defendant.)

Cross-int. 53. The stock was transferred that day, was it not?

(Objected to.)

Ans. Yes, sir.

(Objected to.)

Cross-int. 54. Was M'r Conant there that day?

(Objected to.)

Ans. No, sir.

(Objected to.)

Cross-int. 55. How was it transferred, then, if M'r Conant wasn't there, and these were among his collaterals or collaterals in his keeping?

(Objected to.)

Ans. He usually left them with the teller to look after them. He left them in his care.

(Objected to.)

Cross-int. 56. Had M'r E. P. Adams any authority to sign your name, as your attorney, in transferring that stock?

(Objected to.)

137 Ans. He must have had verbal authority.

(Objected to.)

Cross-int. 57. Why didn't you transfer the stock yourself, instead of giving him verbal authority to do it, if he had verbal authority?

(Objected to.)

Ans. Because I had never been in the habit of changing the collaterals, or taking M'r Conant's collaterals, or changing them in any way.

(Objected to.)

Cross-int. 58. Now, sir, if M'r Adams acted as your attorney in making this transfer, why was it not dealing as your agent with M'r Conant's collaterals, or collaterals in his keeping?

(Objected to.)
Ans. It was, indirectly, I suppose.
(Objected to.)
Cross-int. 59. Was not the transfer made by M'r Adams without any authority from you, verbal or otherwise?
(Objected to.)
Ans. No, sir.
(Objected to.)
Cross-int. 60. Do you swear that you gave him authority to transfer that stock?
(Objected to.)
Ans. I think I did.
(Objected to.)
Cross-int. 61. Can you give any reason other than the one you have given why you did not transfer it yourself?
(Objected to.)
Ans. I don't think I can.
(Objected to.)
Cross-int. 62. Can you give any reason why you didn't surrender to M'r Hayward his checks or memoranda before spoken of?
(Objected to.)
Ans. I suppose for the fact that they had a right to return the stock at that time.
(Objected to.)
Cross-int. 63. In case they had returned the stock the bank would have held the notes against M'r Hayward, would they not?
138 (Objected to.)
Ans. I presume so.
(Objected to.)
Cross-int. 64. You mean to be understood that when this stock was transferred to Mess'rs Goodwin, Robinson, and White, that they had the option to return it and not pay their notes, do you?
(Objected to.)
Ans. I think I told them I'd take it back.
(Objected to.)
Cross-int. 65. Will you please answer the last question directly?
(Objected to.)
Ans. I told them I'd take it back.
(Objected to.)
Cross-int. 66. And it was upon that condition they gave their notes, was it?
(Objected to.)
Ans. They gave their notes and I told them that.
(Objected to.)
Cross-int. 67. Did they not refuse to make the purchase until you told them you would take back the stock if they wished it?
(Objected to.)
Ans. The stock came to more money than the first figures, and I told them that I would take the stock back at the expiration of the notes.
(Objected to.)
Cross-int. 68. When they found that the stock came to more money than was first figured, did they not refuse to take it until you told them you'd take it back at the expiration of the notes?
(Objected to.)
Ans. They took it with that understanding with me.
(Objected to.)

Cross-int 69. Didn't you tell J. G. Weld that you would surrender the note he had indorsed upon the return of the stock at the expiration of the note, if he wished it?

(Objected to.)

Ans. I think I did not.

(Objected to.)

139 Cross-int. 70. Did you never state it so to him?

(Objected to.)

Ans. I had nothing to do with him.

(Objected to.)

(Adjourned.)

APRIL 17, 1873.

Cross-int. 71. Reverting to the 7th September, 1868, was that the day that you saw M'r Hayward and spoke to him of the proposition to buy, assuming for explanation that the stock was transferred to Mess'rs Robinson, Goodwin, and White, on the 8th of September?

Ans. I think it was.

Cross-int. 72. Do I understand you to say that on that occasion you named to him that you thought you could sell that stock to three of the directors, some of the directors, or to these three parties, White, Robinson, and Goodwin?

Ans. I did.

Cross-int. 73. Did you name the parties?

Ans. I think I did.

Cross-int. 74. Did you say they were directors of the bank?

Ans. I gave him to understand they were directors of the bank. I told him so.

Cross-int. 75. Were you then acting as president of the bank or in your private capacity?

Ans. I think as president of the bank.

Cross-int. 76. Were you acting as president of the bank in all your transactions relative to that stock and the sale of it?

(Objected to.)

Ans. I thought I was.

Cross-int. 77. Did you say to him that you had an offer from these named gentlemen to buy that stock or that you thought you could sell it to them?

Ans. I told him that I thought I could sell it to them. I think that was the word I used.

Cross-int. 78. After reporting at the bank that interview did you again return to M'r Hayward and report to him what those gentlemen said and did?

140 Ans. I don't think I did.

Cross-int. 79. Did you at any time in the month of September, 1868, report to him what those gentlemen said and did touching that stock?

Ans. I don't recollect.

Cross-int. 80. Did you see him about that stock at all after Sept. 7, until after the 11th of March, 1869?

Ans. I couldn't say positively that I did.

Cross-int. 81. Can you not say positively that you didn't?

Ans. I don't recollect that I did.

Cross-int. 82. Did you ever yourself render to him an account of the sale of that stock, or direct any person in the bank to render him such an account?

Ans. I don't remember definitely to have done so.

Cross-int. 83. Do you not remember that you didn't do so?

Ans. I do not distinctly.

Cross-int. 84. You have spoken in your examination-in-chief of having some conversation with M'r Hayward about a balance of some sixty or seventy dollars arising in the difference between 6 and 7 per cent. interest. When did you have any such conversation with him, if you ever had any?

Ans. I think I had it several times.

Cross-int. 85. State once, as nearly as you can.

Ans. I had it immediately after he paid the interest up to April.

Cross-int. 86. In April of what year?

Ans. 1867.

Cross-int. 87. Did it have reference to the payment of 6 or 7 per cent. upon the loan generally, or to the payment of a rate of interest higher than 6 per cent. on the loan for the time previous to that date?

Ans. Well, it must have had reference to interest.

Cross-int. 88. Perhaps my question isn't clear, but I wish to know whether that conversation referred to a balance due from M'r Hayward for interest over 6 per cent. that had at the date of that conversation become due.

Ans. I had a conversation with him about interest several times at that time.

Cross-int. 89. What about interest; about his paying more than 6 per cent., or what?

141 Ans. It must have been.

Cross-int. 90. Paying more than 6 per cent. for the then past or for the future?

Ans. I think it might have been both. Both.

Cross-int. 91. Did he then agree to pay more than 6 per cent. for the past and the future?

Ans. I can't remember. I think he did.

Cross-int. 92. How much more did he agree to pay; 6½ per cent., 7 per cent., 7½ per cent., or how much?

Ans. My impression is it was 7.

Cross-int. 93. Did he say when he would pay it?

Ans. Well, he promised to pay.

Cross-int. 94. Did he say when?

Ans. Every time I asked him he promised to pay. I asked him a good many times.

Cross-int. 95. When you asked him to pay the balance of interest, did you not refer to interest then due?

Ans. Yes, sir.

Cross-int. 96. Did you ever say anything to him upon that subject after the interview spoken of on the 7th of September, '68?

Ans. I can't recollect particularly that I did.

Cross-int. 97. Now, sir, can you not swear positively that you never spoke to him of his account or any balance of account after Sept. 8, 1868?

Ans. I couldn't swear positively.

Cross-int. 98. What do you think about it?

Ans. I cannot recollect any particular time.

Cross-int. 99. I don't ask for a particular time. I ask whether you think you ever spoke to him about his account or any balance of his account after Sept. 8, 1868?

Ans. I might, but I don't recollect it.

Cross-int. 100. Did you ever see M'r Hayward or speak to him upon any subject from the 7th of September, 1868, until the spring of 1869?

Ans. I can't fix the time I saw him. I can't fix the time when I saw him.

Cross-int. 101. I neither ask you when you saw him nor when
112 you spoke to him. I ask if you spoke to him between the 7th of September, 1868, and the 11th of March, 1869?

Ans. I can't recollect any time.

Cross-int. 102. What is the usual process of passing upon notes for discount at your bank?

(Objected to.)

Ans. They are recorded on the book when they are proposed for discount.

Cross-int. 103. Any note, then, proposed for discount is entered upon the book and submitted to the board of directors, is it, at their meeting?

(Objected.)

Ans. They are proposed on discount-days, Monday and Thursday, generally. There are exceptions, but generally.

Cross-int. 104. When proposed, they are submitted to the directors and passed upon, are they?

Ans. The book is kept always open to the directors.

Cross-int. 105. How is it decided whether a note is discounted or not?

Ans. It is usually marked, some mark posted against the note.

Cross-int. 106. Who decides what notes are to be discounted? Is it or not done by a vote of the board of directors?

Ans. It is generally approved, not always done by the board of directors: they are not always present when it is done.

Cross-int. 107. Would three notes of over $13,000 each be discounted without the vote or approval of the board of directors?

(Objected to.)

Ans. It would be sometimes done with the approval of either one of the directors. It is sometimes done by the president and approved by one or more of the directors.

Cross-int. 108. Did you aid in preparing the answer in this case, as president or as director of the bank?

Ans. I was asked some questions: I didn't know that it was particularly in preparing the answer in this case: I gave what information I had.

Cross-int. 109. Did you ever read the answer put in by the bank?

Ans. Not wholly.

113 Cross-int. 110. Did you ever read any of it?

Ans. I think I looked at it. M'r Conant read it to me, I think.

Cross-int. 111. Did M'r Conant read it all to you?

Ans. I presume he did.

Cross-int. 112. When?

Ans. I couldn't state when.

Cross-int. 113. Was it before it was filed or since we commenced taking testimony in this case?

Ans. It was before that.

Cross-int. 114. Before what? Before it was filed?

Ans. Before I knew you were taking testimony.

Cross-int. 115. Was not the answer read to you by M'r Conant after it was sworn to by him and filed in this case?

Ans. It was read before it was signed by him. He told me he had not sworn to it.

Direct examination resumed:

Int. 47. When M'r Conant read the answer to you, what did you say to it?

(Objected to.)

Ans. I didn't say much of anything to it.

Int. 48. Do you remember what you did say?

(Objected to.)

Ans. Not particularly.

Int. 49. Did you make any objection to any part of it?

(Objected to.)

Ans. I did not at all. I don't think I did.

Int. 50. Did you at the time know who had prepared or written the answer?

(Objected to.)

Ans. I supposed M'r Ranney had written it.

(Objected to.)

Int. 51. Did you know at the time that M'r Ranney was acting as counsel in this suit for the bank?

Ans. I did.

Int. 52. Was it with or without your direction that M'r Ranney was employed as counsel by the bank in this suit?

(Objected to.)

144 Ans. It was by my advice with others.

Int. 53. Did you before the answer was prepared and filed, yourself have any interview with the counsel in reference to this suit?

(Objected to.)

Ans. I think I did with M'r Ranney at M'r Robinson's house once.

Int. 54. Did you act in conjunction with any other director of the bank in preparing and furnishing the facts of the suit with the view of an answer?

(Objected to.)

Ans. I might have talked once or twice, answering some questions; not more than that.

Int. 55. Do you recollect whether you did or not?

(Objected to.)

Ans. I don't think I did.

Int. 56. Did you or not talk and confer with M'r Robinson about it?

(Objected to.)

Ans. A few questions, and very few, indeed.

Int. 57. Did you or not see a written statement of facts which he was preparing for the counsel, or which he had prepared?

(Objected to.)

Ans. I never saw any written one, to my knowledge.

Int. 58. What did you see?

(Objected to.)

Ans. I have no recollection of seeing anything in writing.

Int. 59. You say that a letter signed by you, directed to Charles L. Hayward, dated Sept. 12, 1872, being Exhibit 24, you suppose to have been written by M'r Ranney. Will you examine it again, and then state whether you mean to be understood that it is the handwriting of M'r Ranney?

(Objected to.)

Ans. I don't know his writing and am not able to tell.

Int. 60. How long has M'r Ranney been your counsel, and have you ever seen him write or his handwriting?

(Objected to.)

Ans. Several years; quite a number of years; very satisfactory too. I should rather think this was not his handwriting.

Int. 61. (Latter part of the question repeated.)

145 (Objected to.)

Ans. I have seen his writing, but not paid particular attention to it.

Int. 62. Has the letter shown you, and referred to, any resemblance to his handwriting?

(Objected to.)

Ans. On looking for that purpose, I don't think it has.

(Letter produced and marked "Exhibit 25, E. T. N., Ex'r.")

Int. 62*a*. Will you now look at the letter shown you, dated Sept. 12, 1872, being marked "Exhibit 25, E. T. N., Ex'r," and compare it with Exhibit 24, and say whether you ever saw or read that before?

(Objected to, that the paper has no relation to the case and the witness is not competent to compare handwriting.)

Ans. I think I have.

Int. 63. When and on what occasion did you first see and read it?

(Objected to.)

Ans. It was sent to the bank to me.

Int. 64. Was it, or not, received with, or accompanied by, the letter marked "Exhibit 24," sent for you to sign?

(Objected to.)

Ans. Yes, sir.

Int. 65. Did you, or not, read it, that is, Exhibit 25, and then sign and send to the counsel the letter marked "Exhibit 25?"

(Objected to.)

Ans. I did.

Int. 66. What did you do on the receipt of letter "Exhibit 25" and the letter "Exhibit 24," sent you at the time?

(Objected to.)

Ans. I looked them over and returned them.

Int. 67. Looked what over, and returned what?

(Objected to.)

Ans. Both.

Int. 68. Do you mean to say that you returned to me the letter addressed to you?

(Objected to.)

Ans. I don't think I did.

Int. 69. Did you return the other with or without the signature, that is, Exhibit 24?

146 (Objected to.)

Ans. With my signature.

Int. 70 (de bene). When M'r Adams went to transfer the Hecla stock to the three purchasers, M'r White, M'r Robinson, and M'r Goodwin, who, if any one, delivered to him the certificates for that purpose?

(Objected to the qualification of the interrogatory.)

Ans. I couldn't say positively. I presume they were in the possession of M'r McCaire or M'r Harrington. They were in his care.

Int. 71 (de bene). By whose direction was it done?

(Objected to.)

Ans. I presume it was mine.

Int. 72 (de bene). Can you not state more positively than by presumption?

(Objected to.)

Ans. I have no doubt it was.

Int. 73 (de bene). Did you, or not, yourself take any other steps or do any other act towards or in making the transfer?

(Objected to.)

Ans. I don't recollect. I don't see how they could have done it without some written authority.

Int. 74 (de bene). Did you, or not, give written authority?

(Objected to.)

Ans. I have no recollection.

Int. 75 (de bene). Will you look at the signatures on the back of Exhibits 17 and 18, and state whether you did or did not sign the assignment or power in blank on the certificates when they were sent to be transferred or were delivered for transfer?

(Objected to.)

Ans. Those are not my signatures.

Int. 76 (de bene). These are copies of the originals produced h e; will you look at the originals and see whether your signature is there?

(Objected to.)

Ans. I will.

Int. 77 (de bene). Do you now remember whether you did or did not sign the transfer or power on the back of the certificates, copies of which are here and are the exhibits last named?

(Objected to.)

147 Ans. I don't remember distinctly, but I've no question I did it.

Int. 78 (de bene). Was M'r Conant there at the time?

(Objected to.)

Ans. I don't think he was, or he would have transferred them himself.

Int. 79 (de bene). What do you mean, then, in your cross examination when you say in substance that you didn't meddle or interfere with the securities which M'r Conant held?

(Objected to.)

Ans. I mean that when he left them with M'r Harrington I took them from him and executed them—such papers as required my signature.

Int. 80 (de bene). Do you remember, so you could now state positively, the day of the month in September, '68, when you say you saw M'r Hayward and communicated to him the proposition of the three directors to buy the stock, so you can state on what day of the month that interview occurred?

(Objected to.)

Ans. Not without looking at the record of the meeting.

Int. 81 (de bene). Was there a meeting of the directors on the day when you had the interview alluded to with Hayward?

(Objected to.)

Ans. I couldn't say it was a regular meeting. I can't say it was or was not.

Int. 82 (de bene). Do you mean to say that there was any record of the transaction made, that is, the interview between you and M'r Hayward?

(Objected to.)

Ans. Not of the interview. There was a meeting, which occasioned my going over there; that is, of some of the directors. I couldn't say how many.

Int. 83 (de bene). What is there in the record then which will enable you to determine whether it was on the 7th or 8th?

(Objected to.)

Ans. It will show the day of the week. It will show whether it was

a regular meeting or discount-day. If it was discount-day, it was a regular meeting.

148 Int. 84 (de bene). Can you now state whether there was a meeting of the directors, regular or otherwise, on the precise day when you went and had an interview with M'r Hayward, named?

(Objected to.)

Ans. There were several of them then present. I think it was a meeting of the directors, but still I'm not positive.

Int. 85 (de bene). Was or was not the matter of selling to the directors, when proposed, held in abeyance until you had first seen and submitted the matter to M'r Hayward?

(Objected to.)

Ans. I think the price had been named on the stock, and I went immediately over to see M'r Hayward.

Int. 86 (de bene). The price to whom or for whom to pay?

(Objected to.)

Ans. The purchasers. In other words, that was the amount that was fixed upon the stock.

Int. 87 (de bene). Had you given the names of the proposed purchasers?

(Objected to.)

Ans. I told him who I thought I could sell it to.

Int. 88 (de bene). Will you now give them again?

(Objected to.)

Ans. Three of the directors—M'r White, M'r Robinson, and M'r Goodwin.

Int. 89 (de bene). Will you now state whether that price was the price which was paid on the actual transfer of the stock of which mention has before been made or some other amount?

(Objected to.)

Ans. It was the amount of the debt.

Int. 90 (de bene). Do you recollect who figured up the amount of the debt at that time—after the proposition was made or when it was made?

(Objected to.)

Ans. M'r Harrington, or by somebody else his direction.

Int. 91 (de bene). Do you recollect whether, after that time, any error was discovered in it?

(Objected to.)

149 Ans. I think there was.

Int. 92 (de bene). How long after?

(Objected to.)

Ans. Not long. I think on my return from M'r Hayward's, if I recollect right.

Int. 93 (de bene). Do you recollect so that you can state positively whether it was on the same or the next day?

(Objected to.)

Ans. I could not. I can't recollect it.

Int. 94 (de bene.) Do you recollect so you can state positively whether the stock was actually transferred on the day when you had the interview with M'r Hayward, or the following day?

(Objected to.)

Ans. I don't think it was transferred that day.

Int. 95 (de bene.) How many days after, as near as you can state, if you can state positively?

(Objected to.)

Ans. I can't. My impression is it was about that time; I couldn't state positively. My signature might have been on the certificate and not transferred for a month, as far as I know, if it is there at all. I shouldn't have known it.

Int. 96 (de bene). Do you recollect on what day you put your name on the back of the certificate; whether on the day you had your interview with M'r Hayward, or afterwards?

(Objected to.)

Ans. I don't think it was on the same day.

Int. 97 (de bene). When the error in the amount due from M'r Hayward was discovered, did the correction of the error make the amount more or less than the first amount stated?

(Objected to.)

Ans. It was more.

Int. 98 (de bene). How much larger price did it require to be fixed to the stock per share than was required to meet the sum as first stated?

(Objected to.)

Ans. I never have looked, but my impression is from two to three dollars per share.

150 Int. 99 (de bene). When you returned from M'r Hayward to the directors, after the interview named, what did you report to them? State what you said, as near as you can recollect it.

(Objected to.)

Ans. Well, I think I reported that I saw him; he didn't object; that he was satisfied, or something of that kind.

Int. 100 (de bene). State the names of the persons present, and to whom you made that report.

(Objected to.)

Ans. I think M'r Goodwin, M'r White, and M'r Robinson. I am pretty positive there were two of them. I think they were all there. I don't know but somebody else; but I can't think, couldn't say.

Int. 101 (de bene). How long did the interview last, after you returned?

(Objected to.)

Ans. Not a great while.

Int. 102 (de bene). Can you remember the conversation so as to give it exactly after you returned at that time, at that precise interview?

(Objected to.)

Ans. As near as I can recollect—I can't remember, it isn't likely, everything.

(Counsel for complainant requests the examiner to note that the witness commenced to answer further, and his further answering was objected to by the counsel for the respondent, and he did not proceed.

Counsel for defendant states that the witness was proceeding to state what the conversation was, which he didn't ask for.)

(NOTE BY EXAMINER.—The witness proceeded to answer the interrogatory, and answer in the following words: "As near as I can recollect," when he was interrupted by the counsel for defendant, who made the following remarks to the witness: "I didn't ask you what the conversation was. I only want to know whether you remember what it was, so that you can state it," or words to that effect.)

151 Int. 103 (de bene). I repeat the question to you in substance: Do you remember the exact conversation that occurred, so that you could state it exactly, if I should ask you. I do not now ask you what it was, but whether you recollect it so that you can state it?

(Objected to.)

Ans. I recollect some of it.

Int. 104 (de bene). How many of the individuals present spoke on the subject besides yourself at this precise time?

(Objected to.)

Ans. I think they all did in the general conversation.

Int. 105 (de bene). How soon after that interview did you have another interview with them?

(Objected to.)

Ans. I couldn't say but what it was that day or the next day. I don't know but what both.

Int. 106 (de bene). How many did you have before the transfer was made—notes made and stock delivered?

(Objected to.)

Ans. I couldn't say. He had a conversation two or three times.

Int. 107 (de bene). Can you now remember so as to state and distinguish just what was said at each one of these interviews, if I ask you? I do not now ask you, but only if you remember so that you can if I do ask you.

(Objected to.)

Ans. In part I can.

Int. 108 (de bene). Can you remember just what was said at each one of the interviews, so as to state and distinguish between each of the interviews, and state what was said at each if I ask you?

(Objected to.)

Ans. I could state what related to them.

Int. 109 (de bene). Can you without first knowing and fixing in mind how many interviews there were?

(Objected to.)

Ans. They all related to one thing, one subject, in substance.

Int. 110 (de bene). When you returned from Mr Hayward's, after the interview which you had had with him, and which you have named, state first the language, as near as you can, which you used, and
152 what you said. Put it in the words which you used at the time, as near as you can.

(Objected to.)

Ans. I stated that I had seen him, he had no objections, or I told them I could sell it.

Int. 111 (de bene). Is that all you said?

(Objected to.)

Ans. I might have said other things.

Int. 112 (de bene). Did you state to them as to what he made no objection?

(Objected to.)

Ans. Not particularly.

Int. 113 (de bene). What was there that Hayward didn't make objection to?

(Objected to.)

Ans. Nothing.

Int. 114 (de bene). What had you allusion to when you told them he had no objection?

(Objected to.)

Ans. To the sale of the stock.

Int. 115 (de bene). Sale to whom?

(Objected to.)

Ans. The parties I have named.

Int. 116 (de bene). At what price?

(Objected to.)

Ans. The amount of the debt. I haven't the figures with me.

Int. 117 (de bene). Then before that interview the directors had proposed to buy the stock, or it had been proposed to sell the stock to them at that price?

(Objected to.)

(Question withdrawn.)

Int. 118 (de bene). Had there then been before that any proposition to buy or sell that stock to the directors; if so, at what price to the three directors named?

(Objected to.)

Ans. There had been a talk about it.

Int. 119 (de bene). When you told them—that is, the direct-
153 ors—that Hayward had no objections, who spoke first in reply to what you had said?

(Objected to.)

Ans. I couldn't say.

Int. 120 (de bene). State what he said and the language he used.

(Objected to.)

Ans. It was said that M'r Harrington had made a mistake, and it would cost more than they said it would when I went out. I couldn't state positively it was at that time or at the moment that I came back.

Int. 121 (de bene). Do you recollect who said it?

(Objected to.)

Ans. It was talked over by all who were present. They expressed one opinion.

Int. 122 (de bene). Do you remember who spoke next?

(Objected to.)

Ans. I think likely I replied. It was a general conversation about the sale of the stock.

Int. 123 (de bene). Do you remember what you replied?

(Objected to.)

Ans. I think I advised them to purchase.

Int. 124 (de bene). Do you remember what you said precisely to them?

(Objected to.)

Ans. Not at that time.

Int. 125 (de bene). How did the next interview begin, and what was said, and who said it?

(Objected to.)

Ans. I think I proposed to have them buy the stock.

Int. 126 (de bene). You say "I think." Do you remember?

(Objected to.)

Ans. I remember. I did propose for them to buy it.

Int. 127 (de bene). Do you remember who was present then?

(Objected to.)

Ans. I remember one or two; certainly one, sure.

Int. 128 (de bene). Which one?

(Objected to.)

Ans. My impression is M'r White was. I don't know but what
154 all were there. I don't remember. There was no particular meeting. They dropped it as it was convenient. I don't think they came for that particular purpose.

Int. 129 (de bene). What did you state at the next interview?

(Objected to.)

Ans. I can't state. If it was within a few days I could state whatwas stated. When they were dropping in, not at regular meetings, some-

times they would come in two or three times a day. Sometimes they would all come in, sometimes not at all.

Int. 130 (de bene). How many times was the matter talked over; that is, how many interviews before the stock was actually transferred and the transfer completed, that is, between you and one or more of the purchasers?

(Objected to.)

Ans. Not a great many. When the transfer was made I can't say; I don't know that the transfer was made. Not a great many before they concluded to take the stock.

Int. 131 (de bene). Were there as many as three?

(Objected to.)

Ans. There was considerable talk about it. I can't tell what in one day would consist of a meeting. We might talk about it now, and in half an hour talk again about it.

Int. 132 (de bene). You say you told them that you would take the stock back; can you state on what day that was said, so as to be exact?

(Objected to.)

Ans. It was one of the days that they concluded to take it.

Int. 133 (de bene). Can you tell which one?

(Objected to.)

Ans. I think it was the second day; that is my impression.

Int. 134 (de bene). Second day of what?

(Objected to.)

Ans. The second time we had a hearing. If you call one day, I think it was the next day after I went in to Hayward's.

Int. 135 (de bene). Are you confident of that?

(Objected to.)

155 Ans. Without looking at the dates, I am very sure it was. I think it would refresh my memory by looking at the dates.

Int. 136 (de bene). Do you know whether it was on the same day when the notes were delivered and the certificates of stock delivered for transfer?

(Objected to.)

Ans. That is my impression; the notes were dated the day of the conversation. My impression is that was one of the days. I think the notes were dated on one of the days that we had the conversation.

Int. 137 (de bene). Do you know whether the notes were actually given and the certificates of stock delivered at the same time you made that statement; that is, the statement that you would take it back?

(Objected to.)

Ans. The certificates may have been delivered and remain there. They might have been taken and they might not. They might be in the bank. When they gave their notes we considered they had the stock whether they took it or not.

Int. 138 (de bene). Do you remember whether you made the remark that you would take the stock back before or after the notes had actually been given and the certificates delivered?

(Objected to.)

Ans. I think I did.

(Objected to.)

Int. 139 (de bene). Which?

Ans. Before the notes were given.

Int. 140 (de bene). Do you remember whether it was the same time, or not?

(Objected to.)

Ans. I know it was before.

Int. 141 (de bene). When did you tell them you'd take it back?

(Objected to.)

Ans. Before the notes were given.

(Objected to.)

Int. 142 (de bene). In what time did you say you'd take it back?

Ans. At the expiration of the six months.

156 Int. 143 (de bene). At the time you made that remark were the parties demurring about taking it?

(Objected to.)

Ans. Yes, sir.

Int. 144 (de bene). And did this demurring occur upon the discovery that the price came to a larger sum than was first talked?

(Objected to.)

Ans. Yes.

Int. 145 (de bene). Do you remember the exact language you used when you said to them that you'd take it back?

(Objected to.)

Ans. I think I said to them that the stock was worth the amount, and that they didn't run any risk in taking it; and if they had any fears of it, if they would give their notes for six months, I would take the stock back at the expiration of the six months.

Int. 146 (de bene). That you'd take it back if what—anyway, or if they wanted you to?

(Objected to.)

Ans. If they wanted to return it.

Int. 147 (de bene). Did you say anything to them about their being obliged to return it, whether they wanted to or not?

(Objected to.)

Ans. No, sir; I didn't so understand it. I don't think there was anything said about it.

Int. 148 (de bene). Then when you told them that you'd take it back at the end of the six months if they were dissatisfied with it, or had any fears about it, they were hesitating about taking it, and you were urging them to buy—is that so or not?

(Objected to.)

Ans. I rather urged them to purchase it.

(Adjourned.)

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Int. 149 (de bene). At the end of the six months did either of the purchasers ask you to take the stock back?

(Objected to.)

Ans. They did not.

157 Int. 150. You say you told them you'd take it if they were dissatisfied in six months: did yousay at the end of the six months or at any time within the six months?

(Objected to.)

Ans. At, I think, any time within the six months.

(Objected to.)

Int. 151. Do you remember the phraseology you used—whether you said, "I'll take it at any time if you are dissatisfied within the six months," or, "I'll take it off your hands at any time within the six months," or "I'll take it back"? Can you now swear which of those expressions you used?

(Objected to.)

Ans. I think I said I'd take it and return their notes any time within the six months—any time.

Int. 152. And you remember the exact phraseology so that you will swear to the words used?

(Objected to.)

Ans. Only as I have stated. It is a good while ago to remember the exact words.

Int. 153. Do you mean that you do not remember the exact words, or that you do?

(Objected to.)

Ans. I mean I have stated them as near as I can remember.

Int. 154. The question is whether you do remember the exact language at that length of time; that admits of an answer, yes or no.

(Objected to.)

Ans. No, sir.

Int. 155. Do you remember in which one of the several interviews you had with the purchaser in reference to the sale you made this remark?

(Objected to.)

Ans. I don't particularly which one of them—during the negotiation.

Int. 156. Were you one of those who felt sanguine about that stock?

(Objected to.)

Ans. I believed it to be good stock.

158 Int. 157. Did the other directors, while the bank held it, share with you in that opinion, or were they complaining and wanting to get rid of the stock and have the loan paid and the stock redeemed?

(Objected to.)

Ans. I don't know what their opinion was in regard to the stock. They were desirous to have the loan paid.

Int. 158. Had or not, the bank-examiner spoken of it and complained of it before the sale was made and while the bank held it?

(Objected to.)

Ans. He spoke of it several times. Thought it wasn't desirable property for the bank to hold.

Int. 159. Do you recollect of M'r White's saying anything to the other purchasers about his being willing to take the stock within six months if they were dissatisfied with it, at any of the interviews in which the matter of selling was discussed, or at the time when you made the remark that you'd take it back, or that you'd take it?

(Objected to.)

Ans. I don't recollect distinctly; still he might have said it.

Int. 160. Will you now look at the signature of John Demeritt, president, on the back of the original certificates now before you, copies of which have been produced, marked Exhibits 17 and 18, and state who signed "John Demeritt, president"?

(Objected to.)

Ans. I signed them.

Int. 161. How many times do you recollect of seeing M'r Hayward about his paying some sixty-odd dollars, of which you have before testified?

(Objected to.)

Ans. Quite a number of times.

Int. 162. At how long intervals?

(Objected to.)

Ans. I couldn't state precisely.

Int. 163. State, as near as you can, and the number of times, according to your best recollection.

(Objected to.)

Ans. I didn't go to see him expressly for that. I went to see him to get the whole debt paid. When I went to see him I asked him for that. I didn't always go to see him for that purpose.

159 Int. 164. Can you tell the year or season of the year of any of these interviews with Hayward?

(Objected to.)

Ans. I was constantly in and out, trying to get him to pay the loan.

Int. 165. I refer in my question to the matter of getting that sixty-odd dollars, growing out of the difference of interest between 6 and 7 per cent., of which mention has been made.

(Objected to.)

Ans. Immediately after I found out that we hadn't charged but 6.

Int. 166. Had he or not agreed on the loan to pay 7 per cent.?

(Objected to.)

Ans. I don't think he had until that time that I saw him. I supposed he would pay 7. I don't think he had until I spoke to him about it.

Int. 167. When you asked him for the sixty-odd dollars named, what did he say about paying it?

(Objected to.)

Ans. He said I ought not to charge him so much.

Int. 168. Did he ever at any time promise to pay it?

(Objected to.)

Ans. He promised to pay a certain amount.

Int. 169. What amount did he promise to pay?

(Objected to.)

Ans. He promised to pay up to that time ½ between 6 and 7 per cent., which made about sixty or seventy dollars—something like that.

Int. 170. Who figured up for you the amount due for you to carry to him?

(Objected to.)

Ans. I couldn't say whether it was M'r Conant or M'r Adams. M'r Adams was the discount-clerk.

Int. 171. Was it figured up for you by some one, or did you figure it up yourself?

(Objected to.)

Ans. It was figured up by some one.

Int. 172. When the stock was sold to the three directors named
160 and the amount figured up by M'r Harrington, do you recollect what rate of interest it was figured at that time?

(Objected to.)

Ans. I do.

Int. 173. State.

(Objected to.)

Ans. 6 per cent.

Int. 174. Do you know whether, at that time, there was an unsettled matter growing out of the sale of some government bonds which the bank had held, and which M'r Hayward pledged to the bank, and which had been sold on an order of his in the matter of another loan not embraced in the loan in which the Hecla stock was held?

(Objected to.)

Ans. I knew there were some bonds sold, and that there was something about that loan that had not been paid, which was held and applied to the general loan.

Int. 175. Do you know whether that matter had been adjusted at the time of the sale of the stock to the three directors named?

(Objected to.)

Ans. I do not.

Int. 176. Do you know whether there was a surplus left after the sale of the said government bonds after liquidating the debt for which they were held as collateral?

(Objected to.)

Ans. Yes; there was.

Int. 177. Do you know, and can you now recollect, whether, in making up the statement of the amount due from M'r Hayward on the 8th of September, 1868, in which the debit to M'r Hayward appeared to be $39,257.16, the surplus growing out of the sale of these bonds was embraced in the calculation?

(Objected to.)

Ans. I don't know it. I didn't make it up, and have no means of knowing.

Int. 178. Will you please look at Exhibit 21, being the account produced by M'r Hayward as the original which was given to him after the 8th of September, when the stock was sold, and see if in that
161 account there is embraced the item of a said surplus growing out of the sale of the said bonds?

(Objected to.)

Ans. I don't see it here.

Int. 179. Do you not find that it is not there?

(Objected to.)

Ans. It is not here.

Int. 180. Is not the debit side of that account the exact amount of the three notes given by the three directors who purchased the stock the 8th of September, '68?

(Objected to.)

Ans. I think it is. I am confident it is.

Int. 181. Then at that time had the matter of the surplus growing out of the sale of the government bonds been adjusted?

(Objected to.)

Ans. The bonds had been sold before. Whatever there was was in hands of the cashier receiving. I don't keep the books.

Int. 182. And on the 8th of September, 1868, as of which time the account which you hold, being Exhibit 21, was made, had the surplus growing out of the bonds been credited to M'r Hayward in the general account?

(Objected to.)

Ans. I don't know.

Int. 183. Does it appear to be in the account which you hold?

(Objected to.)

Ans. No, sir; it does not.

Int. 184. Will you see whether that account does or does not contain the two original loans, the assessments paid on the stock, and with the interest on the same at 6 per cent., after allowing the interest which had been paid on the loan to April 1, 1867?

(Objected to.)

Ans. Yes, sir.

Int. 185. And does it embrace anything more?

(Objected to.)

Ans. No, sir.

Int. 186. Do I understand you to say, in your cross-examination, that

you think sixty-odd dollars, of which you here testified, was the
162 difference between 6 and 7 per cent. interest that was due on April 1, '67, and not a difference or error that was discovered after the sale of the stock?

(Objected to.)

Ans. I do say so.

Int. 187. How confident do you feel of that?

(Objected to.)

Ans. I feel confident about it.

Int. 188. Have you looked to see, or do you know what amount of money as interest was actually p .id on April 1, '67?

(Objected to.)

Ans. I have not looked.

Int. 189. Was it after that interest had been paid that you called on M'r Hayward for the sixty-odd dollars which you think was a balance of interest due, and about how many times do you say you called on him for it?

(Objected to.)

Ans. Quite a number. I couldn't state how many; quite a number.

Int. 190. Will you look at the books of the bank to refresh your recollection and see what amount of money was paid as interest on 1st day of April, 1867?

(Objected to.)

Ans. I will.

Int. 191. If on Sept. 8, 1868, when the amount of M'r Hayward's indebtedness was made up, there was a surplus growing out of the sale of the government bonds which hadn't been credited to M'r Hayward, and which did not enter into the account which has been shown you, Exhibit 21, that excess or surplus was still due him, was it not?

(Objected to.)

Ant. It would be according to the way the account is made up.

Int. 192. Do you say that that matter was or was not discovered, and the matter adjusted with M'r Hayward, then, after that sale had been made and the account rendered?

(Objected to.)

Ans. Not to my knowledge.

Int. 193. Will you be kind enough to take the balance due and
163 unadjusted on the 8th Sept., '68, growing out of the sale of the government bonds as a surplus above the debt due for which they were held, ascertain the exact amount of it, and then reckon the difference between reckoning the interest at 6 per cent. and 7 per cent. on the account rendered, being Exhibit 21, adjust the balance, and see what it is?

(Objected to.)

Ans. I will.

Int. 194. Will you see whether it is or is not a balance of sixty-odd dollars which would be due from M'r Hayward to the bank?

(Objected to.)

Ans. I will.

Int. 195. Will you then examine the books and see whether the interest paid on the loan on the 1st of Sept., 1867, and then credited to M'r Hayward, was at the rate of 6 or 7 per cent.?

(Objected to.)

Ans. I will.

Int. 196. If in fact the interest paid on the 1st of Sept., '67, and credited to M'r Hayward then, was at 7 per cent., and the balance

which would be due from M'r Hayward to the bank upon the surplus growing out of the sale of the bonds and charging him with 7 per cent. interest on his loan was 60-odd dollars on the 8th of September, or the sum, or about the sum which you say you called upon him for at some time, will you be kind enough, in view of those facts, to reconsider and state when it was that you called upon him to pay the balance of sixty-odd dollars?

(Objected to.)

Ans. I will.

Int. 197. Will you in the same manner reconsider your statement and refresh your recollection by all means in your power, and see whether M'r Conant did or did not, on his return to the bank, on or about the 10th of Sept., '68, discover the error growing out of the said surplus not being credited, and the interest being cast at 6 per cent., and figure out the result after correcting the error, and whether you did or not after that have the interviews with M'r Hayward in relation to his paying the balance so appearing, if it was unpaid by the sale of the stock?

(Objected to.)

164 Ans. I will.

Int. 198. Is your recollection positive, or otherwise, that you did at some time and times call upon M'r Hayward and have interviews with him in relation to paying a balance of sixty-odd dollars?

(Objected to.)

Ans. The balance I know, I am very confident of.

Int. 199. And at those times did you or not state to M'r Hayward or talk to M'r Hayward about what that balance consisted of, or of what it was made up?

(Objected to.)

Ans. I probably did.

Int. 200. Did you or not report what he said about it to M'r Conant, or to the directors, or some of the directors of the bank?

(Objected to.)

Ans. I should be very likely to report it to M'r Conant.

Int. 201. State, according to your best recollection, whether you did or did not report it?

(Objected to.)

Ans. I haven't any doubt but what I did.

Int. 202. Will you state again whether, in any of the interviews with M'r Hayward in relation to the balance, he did or did not promise to pay it?

(Objected to.)

Ans. He did.

Int. 203. Did you or not so report to M'r Conant?

(Objected to.)

Ans. I have no doubt of it.

Int. 204. Is that or not your best recollection?

(Objected to.)

Ans. It is.

Int. 205. Will you state where the original notes or memoranda checks are, which you say M'r Hayward gave the bank originally, on negotiating the loans in question?

(Objected to.)

Ans. I cannot.

Int. 206. What did you do with them?

(Objected to.)

165 Ans. I put them in an envelope and placed them in a drawer in the safe.

Int. 207. When?

(Objected to.)

Ans. I can't fix the time.

Int. 208. Fix it as near as you can.

(Objected to.)

Ans. It was since this suit commenced.

Int. 209. Where had you kept them previously, since the sale of the stock?

(Objected to.)

Ans. M'r Conant had them in his trunk, or he had them in his possession.

Int. 210. Do you remember distinctly where they were, or where they were kept?

(Objected to.)

Ans. He had them in one of his trunks or in his possession.

Int. 211. After the sale of the stock, and down to the time of the commencement of this suit, did you ever have those notes and memoranda in your hands or possession?

(Objected to.)

Ans. I don't think I ever did.

Int. 212. Is your recollection clear and positive on the subject?

(Objected to.)

Ans. I am very positive I never had them. I hadn't them in my possession.

Int. 213. You have stated in your cross-examination that M'r Conant read to you the answer prepared to be filed to this bill of complainant. Now, when the following clause was read to you, to wit: "And the borrowed and received memorandums, which said complainant gave at the time for said loans, and which the defendant still held, were given to the president of the bank, John Demeritt, to be delivered to him; but it was found by him or the cashier, on an accurate or more careful computation, that there was a balance of about sixty dollars still due; that this was stated to complainant, and he agreed that it was so, and promised to pay that balance soon, or as soon as he could do so, and

166 then would take up these memorandums, and close up the matter" —what was your recollection, then, on this point?

(Objected to.)

Ans. I don't know that he read it all to me. I never had seen, never had that document in my possession, and I never had spoken to M'r Ranney or he to me, excepting at M'r Robinson's when the suit was first commenced.

Int. 213¼. Do you mean to change your previous answer given in your cross-examination, wherein you stated that M'r Conant read the whole answer to you?

(Objected to in addition to the general objection, as assuming that the witness has stated what he has not stated.)

Ans. I mean to state that I couldn't state whether he read it all or not.

Int. 214. Can you now state what your recollection was at the time when M'r Conant read the answer to you, or any part of it, as to the matter of this balance of sixty-odd dollars, and the matter of retaining the memorandums of M'r Hayward?

(Objected to.)

Ans. I want a little time to look at those memorandums and checks with M'r Conant. I haven't looked over the matter or the dates.

Int. 215. At the time the answer was being prepared for this suit, you were president of the bank, I believe, were you not?

(Objected to.)

Ans. I was.

Int. 216. Were you or not aware at that time that it was important to have the answer which was to be filed in behalf of the bank, and to be sworn to by an officer of the bank, correct?

(Objected to.)

Ans. Yes. I supposed it was important—knew, of course, it was important, but I wasn't consulted about it. M'r Robinson took charge of it and I had nothing to do with it.

Int. 217. You say in your previous examination that you were asked, and that you stated and communicated certain facts of which you were asked; is that true or not?

(Objected to.)

167 Ans. I was asked a general point; I didn't really know it was in regard to the answer in the suit.

Int. 218. From the time when the sale of the stock was made to the directors named for the six months next ensuing, will you now swear as a matter of memory where those memorandums were?

(Objected to.)

Ans. I never kept any papers belonging to the bank in my possession at all. I've no means of knowing. I might have hunted them up in the bank, but I never overhaul any papers.

Int. 219. Were you or not at different times accustomed to take for a while or for a temporary purpose, in transacting the business of the bank, papers, notes, and memorandums of the bank and then return them?

(Objected to.)

Ans. I have taken notes for collection; I've carried M'r Ranney some, I believe.

Int. 220. And when you've taken notes for collection, have you taken them for delivery to the parties upon collection?

(Objected to.)

Ans. I don't know of such case. That don't occur very often.

Int. 221. Were you active in discharging duties at the bank, or was the business of the bank conducted by other people than yourself?

(Objected to.)

Ans. I spent pretty much my whole time there.

Int. 222. In the transactions which the bank had with M'r Hayward, the complainant, who was the party who treated with M'r Hayward in the transactions personally, as a general thing?

(Objected to.)

Ans. M'r Conant and myself.

Int. 223. If at any time you had interviews with M'r Hayward in relation to the transaction in question and made reports thereof as to what had been said and done between you and M'r Hayward, did you report it correctly as the fact was, or otherwise?

(Objected to.)

Ans. I presume I did.

Int. 224. What do you mean by presume you did?

(Objected to.)

168 Ans. I have no doubt that if I reported it at all I reported it correctly. I had no occasion to report every time I saw M'r Hayward to anybody. I was constantly trying to make the collection.

Int. 225. Do you remember of making any report to M'r Conant or to either of the directors, as to what was said or done between you and M'r Hayward, which was not true or according to the fact?

(Objected to.)

Ans. I don't recollect of making any report that wasn't true.

Int. 226. After the sale of the Hecla stock to the three directors named, did the bank receive or claim, or did you, as president of the bank, ever receive or claim any of the dividends which were declared and payable in cash or stock by the Hecla Company, or the Calumet & Hecla Company after the consolidation?

(Objected to.)

Ans. No, sir.

Int. 227. After the said sale, did M'r Hayward keep any account or have any dealings with your bank?

(Objected to.)

Ans. No, sir; that I know of. I should have been likely to know it if he did.

Int. 228. Did M'r Hayward, after the 8th of September, '68, or the time the stock was sold and transferred to the three directors named, down to the time of the filing of this bill, or of the correspondence that occurred just prior thereto, either to you, or to your knowledge, either make or assert any claim or right to redeem the stock pledged?

(Objected to.)

Ans. He never did.

Int. 229. Did he ever make or assert any such claim to the dividends that were declared, or being declared?

(Objected to.)

Ans. He never did.

Adjourned.

APRIL 21, 1873.

Int. 230. Referring now to interrogatory 190, which was left to be answered, will you please have the same read to you again by the examiner, and answer the same?

169 (Question 190 read to witness.)

Ans. I have.

Int. 231. What do you find the rate of interest to have been reckoned at up to that date?

Ans. I didn't figure it. I saw the amount.

Int. 232. Do you or not find that the interest was reckoned and appears in the books of the bank to have been paid at the rate of 7 per cent. on the loan of $26,500 made in October, '66?

Ans. I don't think it was.

Int. 233. What sum do you find there reckoned?

Ans. I find the amount of interest $837.66.

Int. 234. Have you reckoned to see whether it is not reckoned at 7 per cent. on the two loans made to M'r Hayward in October, '66?

Ans. I have seen that that embraces three loans, I think. If M'r Conant showed me his books correctly, I saw no other entries for interest along that time, and about that time.

Int. 235. Have you figured the interest on the $6,500 loan from the day when it was made, and of the $20,000 loan from the day on which it was made, at 6 and at 7 per cent., to the first day of April, '67? If so, will you state what it will amount to at each rate?

Ans. At six per cent., I make it $717.70; and at 7 per cent., $837.32.

Int. 236. How many shares of the Eliot National Bank stock do you hold in your name?

Ans. Fourteen stands in my name on the books. I think it is four teen. I wouldn't say positively, but I think it is.

Int. 237. Was your retirement from the presidency of the Eliot Bank voluntary, or according to your wish, or otherwise?

Ans. I was asked to resign, and I resigned. I would state that it has no effect on this case, however—not the slightest. I would state, still further, that I am the owner of two hundred shares of the Eliot Bank stock, virtually. I loaned one hundred and fifty shares to my son, who died within a few days, and the stock will be transferred at the proper time back to me.

Int. 238. Did you or not, when the matter of your withdrawing from the presidency of the bank was discussed between you and some of the directors, state any reason why you should remain president?

Ans. I did not. I did state to one of the directors that as this
170 suit was of considerable importance, I thought it would only encourage them to pursue it still further under the circumstances; and I remained in New York a large part of the time to avoid coming in contact with anybody that knew anything about it (counsel for defendant requests the witness to confine himself to answering his question), and I have no recollection of ever anybody naming it to me but once.

(Counsel for defendant requests the examiner to read again the question to the witness, and request the witness to answer the question and nothing else.)

I did not. I had no idea of remaining president any length of time, not the slightest, and so stated it.

Int. 239. Will you please state whether in the course of the discussion about your remaining president, you made any suggestion that your evidence was of importance, or otherwise, to the bank in this suit?

Ans. Not my evidence. It was very important not to encourage these people to go on at that time. It was the only way I expressed it.

Int. 240. Whom did you refer to by "these people"?

Ans. I meant M'r Hayward, of course.

Int. 241. Had you not previous to that time asserted that he had no just claim or suit against the bank?

Ans. I had; and I haven't changed my mind as far as that's concerned.

Int. 242. Do you mean to say that you thought your retiring from the bank would encourage him to go on with the suit when he otherwise might not? Please confine yourself strictly to the question.

Ans. It was reported that I was in a stock speculation. Take it altogether, it probably would not help it any. Those were the facts.

Int. 243. But how was that calculated to affect your testimony in this case on this suit? Please answer the question directly, and nothing more.

Ans. It didn't tend to affect it at all, under any circumstances. I think I told the counsel so—that it would not affect it at all under any circumstances.

Int. 244. How did you suppose, then, that your retiring from the presidency was going to change or affect M'r Hayward's intention and course in prosecuting this suit?

171 Ans. Nothing but the public excitement.

Int. 245. Why did you suggest this to one of the directors in conversation with him—the importance of your testimony in the suit? Please answer the question directly, and nothing more.

(Objected to, because it assumes that the witness has said what he has not said.)

Ans. I had no motive at all; not the slightest. I have no recollection of mentioning the subject at all; certainly only to two.

Int. 246. Do you or not recollect of suggesting the matter of the suit in connection with your holding the presidency?

Ans. I did not, sir. The day after I resigned I called on M'r Robinson. I stated to him that there were some things about this suit that I felt unpleasant about.

(Counsel for defendant requests the examiner to read the question again to the witness and answer the question and nothing more.

Counsel for the comp'ainant requests the examiner to take the answer of the witness fully, before any objection or suggestion is interpolated.)

(Witness continues:) I did not request to remain the president, but I'd resign.

Int. 247. Did you or not the day after the day you had resigned suggest to M'r Robinson the importance of your testimony to the bank in connection with this suit?

Ans. I did not. I stated it to M'r Ranney, and I should like to state it under oath that I stated it to him just as it occurred.

(Answer objected to, the last part of it, as not responsive.)

Int. 248. Have you or not asserted or claimed that if the bank should lose the suit it would be a loss of the directors who purchased it, and not of the bank?

Ans. That was among the first and only questions I asked Mr. Ranney, if the bank should lose the suit, in case it went against them.

(Answer objected to as not responsive.)

Int. 249. Question repeated.

Ans. I have—since we have been taking the testimony.

Int. 250. Was it before or after you began to give your testimony?

Ans. I think I said it to M'r Conant before—I said it repeatedly to him.

172 Int. 251. Have you or not any personal feeling against any one of the directors who purchased this stock?

Ans. I can't say that I have; but I've thought one of them hasn't treated me quite as he should, but I haven't any feeling, not the slightest.

Int. 252. Were you or not requested to resign or withdraw as president, or was it not suggested by some of the officers of the bank that you should do so?

Ans. It was suggested by two whom I've always considered my best friends, and I do to-day. They asked me if I'd remain and be a director, and I told them that I'd rather not. They did urge it, and I consented.

Int. 253. Had you or not, just before or about that time, been engaged in or become involved in the corner or speculation in the Northwestern Railroad stock?

Ans. I don't think that I had anything to do with the corner. I had something to do with the stock. I don't think I made any money in it.

Int. 254. Did you become so involved as to lose any money in it?

Ans. I lost some.

Int. 255. How long after your withdrawal from the presidency did the taking of testimony by the complainant in this suit begin?

Ans. I couldn't tell you. I had about as much as I could attend to in my own business. M'r Conant told me on my return from New York that they had summoned somebody up there, I don't know who it was,

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Int. 255. How long after your withdrawal from the presidency did the taking of testimony by the complainant in this suit begin?

Ans. I couldn't tell you. I had about as much as I could attend to in my own business. M'r Conant told me on my return from New York that they had summoned somebody up there, I don't know who it was,

up to the court. I remarked to him it was about the same length of time before I commenced taking testimony in my case.

(Last of answer objected to as not responsive.)

Int. 256. Had any testimony been taken or any movement been made to take testimony, to your knowledge, before your withdrawal from the presidency?

Ans. I didn't know that there was. There might have been, but I didn't know that there was.

Int. 257. Since your withdrawal from the presidency, have you seen or had any communication, directly or indirectly, with M'r Hayward, the complainant?

Ans. I have not.

173 Int. 258. Have you with his counsel?

Ans. M'r Hodges called on me once; nobody else.

Int. 259. When was that?

Ans. Some time ago.

Int. 260. Since or before your resignation or withdrawal from the presidency?

Ans. Since this examination has been going on.

Int. 261. Where, if you know, are the notes or memorandum checks given by M'r Hayward for the loans in question, in October, 1866?

Ans. I don't know. I've never seen them since I put them into my drawer.

Int. 262. Your drawer where?

Ans. In the safe in the bank vault.

Int. 263. When did you do it?

Ans. I couldn't fix the time exactly.

Cross-examination resumed:

Cross int. 116. Referring to the subject of a surplus derived from the sale of U. S. bonds, amounting to $375.03, did you at any time after Sept. 3, 1867, when the bonds were sold, speak to M'r Hayward about that sum of $375.03?

Ans. No, sir; I never did.

Cross int. 117. Did you ever receive from M'r Conant an account or memorandum containing a calculation or statement of the difference between the interest at 6 and 7 per cent on the Hecla loan, and an item of $375.03, showing a difference of between 60 and 70 odd dollars, purporting to be due from M'r Hayward to the bank?

Ans. I never received the statement. He said to me that that was the case. That is my recollection.

Cross int. 118. Did you ever make any explanation to M'r Hayward after the pretended sale of the stock on the 8th of September, of such a difference (60 or 70 dollars), associating it with the item of $375?

Ans. I don't think I did.

Cross int. 119. Did you ever, after Sept. 8, 1868, speak to M'r Hayward about a balance due from him to the bank on the Hecla loan?

Ans. I have said so before, and I thought so; but when I come

174 to look it was utterly impossible. I did not speak to him about it after that date. I don't mean that I said so here, but that I said it after the suit was begun.

Cross-int. 120. If you ever spoke to M'r Hayward about the payment of a difference arising from casting the interest at 6 or 7 per cent., had it or not reference to the interest due upon the Hecla loan on the first of April, 1867?

Ans. I think I stated so once, and I now repeat it.

Cross-int. 121. Have you any reason to believe that Hayward knew anything about the balance of $375.03?

Ans. I don't know, sir.

Cross-int. 122. In answer to the one hundred and seventy-fourth direct question, you have spoken of this surplus as "held and applied to the general loan." Has that surplus, $375.03, ever been applied on the books of the bank to M'r Hayward's credit?

Ans. The books ought to show that.

Cross-int. 123. Was it ever under your direction, or to your knowledge, indorsed upon either of the memorandums given by M'r Hayward for what we call the Hecla loan?

Ans. I don't recollect it was.

Cross-int. 124. You have spoken of placing those memorandums in a drawer in the bank. Did you so place them after or before this suit was begun?

Ans. I think it was after the suit was begun. M'r Conant was overhauling his papers. They were among them.

Cross-int. 125. They were then handed you by M'r Conant, were they?

Ans. They were.

Cross-int. 126. Do you remember when M'r Hayward ceased to keep an account at the bank?

Ans. Not the exact time.

Cross-int. 127. In answer to the two hundred and fifty-fifth direct question, you have said that you "remarked to him it was about the same length of time before I commenced taking testimony in my case." What case do you refer to?

(Objected to.)

175 Ans. A suit that I had—a case in equity—that M'r Ranney attended to. Nothing to do with the bank at all.

Cross-int. 128. Referring to the pretended sale of that stock, and assuming that the 7th of September, 1868, was the day of a regular meeting of the directors, and assuming that the note was given and the stock transferred on the 8th of September, I ask if the proposition to purchase this stock by these three directors was or not first made on the 7th of September?

Ans. I think it was.

Cross-int. 129. The interviews, then, that you had with these three directors, purchasers, upon this subject were had on the 7th and 8th of September, were they?

Ans. That is the date of the notes—the 8th, is it?

Cross-int. 130. Yes.

Ans. Yes, sir.

Cross-int. 131. When you called on M'r Hayward, and told him you thought you could sell that stock, was, then, on the 7th or 8th of September—that is, it was on one of the days during which you were having interviews with these directors about the purchase?

Ans. Yes, sir.

Cross-int. 132. Did you see M'r Hayward upon the subject of that purchase after the time when you told him you thought you could sell it?

Ans. I have no recollection of seeing him.

Cross-int. 133. You never reported to him, then, what the transaction was between you and the three directors?

Ans. I don't think I saw him.

Cross-int. 134. When you returned from seeing M'r Hayward and reported to these gentlemen, I understood you to say they thought it no

object to take the stock because there had been in the mean time discovered that the sum due from M'r Hayward had been understated ; is that so ?

Ans. Yes, sir.

Cross-int. 135. That understatement of indebtedness had no reference to casting the interest at 6 or 7 per cent., had it ?

Ans. I don't think it had. I should like to state I don't know how it did occur.

176 Cross-int. 136. Turning to the 1st of April, 1867, was not M'r Hayward at this time indebted to the bank for money borrowed upon the pledge of U. S. government bonds ?

Ans. I think he was.

Cross-int. 137. Can you tell how long that indebtedness had existed, and when, or about when, it was created ?

Ans. I can't. It was before the large indebtedness.

Cross-int. 138. Was it not nearly or quite a year before; that is, did it not originate as early as the latter part of '65, or the winter of '66 ?

Ans. I couldn't say.

Direct examination resumed :

Int. 264. Will you state if you recollect what indorsements of interest or otherwise were on or put on to the notes of Hayward or the memorandum checks of Hayward covering the loans of $26,500 in question on the first of April, '67 ?

Ans. I cannot. I don't think I saw them at the time. I saw them but did not examine them.

Int. 265. When did you see them ?

Ans. I don't recollect. They were in the temporary loans. I don't recollect particularly of examining the interest or the memorandums.

Int. 266. Do you recollect whether the interest due up to the 1st of April, 1867, on said memorandums was ever indorsed on them ?

Ans. I saw the indorsement on them, but I didn't examine them in detail.

Int. 267. When did you see the indorsement ?

Ans. I probably saw it once or twice ; I saw it when M'r Conant handed them to me. I saw them several times.

Int. 268. When do you recollect of first seeing the indorsement ?

Ans. I couldn't state. It was among the temporary loans. I couldn't state when I saw them first or last. Yes, I could state the last.

Int. 269. When was the first time in reference to the 1st of April, 1867 ?

Ans. It was about the time they were figuring up the interest for a dividend.

Int. 270. What year do you refer to ?

Ans. 1867, March or April.

177 Int. 271. Was the interest indorsed on the note at that time ?

Ans. I couldn't say. It was figured up ; I couldn't say whether it was indorsed or not.

Int. 272. How soon could you say it was indorsed ?

Ans. I couldn't say. It was the usual practice when the interest was made up to indorse it on.

Int. 273. Is it your recollection that the interest due to April 1, 1867, on said memorandums, was paid on or about April 1, 1867 ?

Ans. The books show it I saw the other day.

Int. 274. What is your recollection as to the fact whether the interest was then paid at 6 per cent. or 7 ?

Ans. I think it was 6.

Int. 275. Do you speak from recollection or from reasoning?

Ans. From both.

Int. 276. What fact about it do you remember?

Ans. I talked with M'r Conant. I think he had made it 6; I thought it ought to be 7.

Int. 277. According to your present recollection was there any delay in paying that interest due April 1st, 1871?

Ans. I shouldn't swear it was paid on the 1st of April exactly. I shouldn't say positively it was. It might have been delayed; oftentimes they are. I can't remember everything that passed.

Int. 278. According to your recollection, was it not paid within a few days or a week?

Ans. It might not have been paid as soon as that. I shouldn't fix the time it was paid.

Int. 279. Was the time when you spoke to M'r Conant about its being figured at 6 or 7 per cent. the time when he was figuring up the interest on the loans in relation to a dividend on, before, or after that time?

Ans. I couldn't remember when I had a conversation with him. It was 6 per cent.; that is my belief.

Int. 280. Do you mean figured at 6 per cent., or that it had been paid at 6 per cent.?

Ans. It had been settled at 6 per cent.

Int. 281. Do you know how the interest had been paid, if at all?

Ans. It had been paid in cash in some way.

178 Int. 282. Was that a fact within your personal knowledge, or was it told you?

Ans. I don't think I saw the cash paid.

Int. 283. Do you know and can you now state how M'r Conant, on the 1st of April, '67, or just before that time, figured the interest?

Ans. He told me 6 per cent., of course. I didn't figure it afterwards.

Int. 284. Did you see the figures at that time?

Ans. I should say that I did. He handed them to me.

Int. 285. Did you have them handed to you on paper?

Ans. I think I did.

Int. 286. Where is that paper?

Ans. I couldn't tell you.

Int. 287. What did you do with it?

Ans. I was in the habit of returning all papers that we wanted to use; all that belonged to the bank.

Int. 288. Do you remember what you did with that precise paper as a matter of recollection?

Ans. I think I took it to M'r Hayward.

Int. 289. Did you leave it with him or carry it away?

Ans. I couldn't say. I think I should be most likely to leave it with him. It is a matter of opinion.

Int. 290. Is that according to your present and best recollection that you did leave it with M'r Hayward?

Ans. I can't seem to recollect whether I left it with him or took it away. I can't state. The papers were not of much value.

Int. 291. Do you recollect whether, when you went to him, you got from him the sixty-odd dollars named and before referred to?

Ans. I do not.

Int. 292. Do you mean to say that you may have got it from him, or may not?

Ans. I don't recollect of getting it from him.

Int. 293. Do you recollect whether you did or not get it from him?

Ans. I recollect he promised. I don't recollect. He didn't give it to me.

Int. 294. Do you mean to say that you don't now recollect whether M'r Hayward actually paid the sum or not to any one?

179 Ans. I mean to say that I, perhaps, shouldn't have known it if he had. If he'd gone into the bank and paid it, I, perhaps, shouldn't have known it.

Int. 295. Now, what is your present recollection as to whether he did pay that sum for which you called upon him or not?

Ans. He didn't pay me.

Int. 296. At any time, or to anybody, I mean?

Int. I say, if he'd went in and paid M'r Conant, I shouldn't have known it, perhaps. It would be more than an even chance that I shouldn't.

Int. 297. I do not ask what the chances are, or for your reasonings, but I ask for your best recollection whether M'r Hayward paid that sum to your knowledge, or whether you knew or learned from any one at or about the time in question that it had been paid?

(Objected to as asking the witness to repeat what he heard others say, not M'r Hayward.)

Ans. I do not know that it has ever been paid.

Int. 298. Can you state the season of the year when you called on M'r Hayward—from recollection, not from reasoning?

Ans. At all seasons, at all times. I was continually calling on him. I didn't cease calling on him.

Int. 299. I refer more particularly to the time when you called upon him in connection with the sixty-odd dollars.

Ans. Whenever I found it out. Continually calling. Can't fix any time.

Int. 300. Have you a memorandum by which you can fix the year or the season of the year?

Ans. I haven't. I, of course, took no memorandums out of the bank.

Int. 301. Have you referred and found any memorandum in the bank which fixes it or the date?

Ans. I haven't tried, and don't know as I could if I did.

Int. 302. What have you seen which enables you to state the fact now differently from what you stated when you say you stated it and thought differently after the suit was brought? Please note the question and answer it specifically, and don't go beyond it.

(Objected to as assuming that the witness has answered what he has not answered.)

180 Ans. I didn't want to see M'r Hayward until the six months had expired. I kept out of his way. I didn't keep out of his way; I didn't want to see him. I had no motive in seeing him.

(Answer objected to as irresponsive.)

Int. 303. (Question repeated.)

Ans. I have seen nothing that comes to refreshing my memory with the exception of trying to refresh my memory.

Int. 304. What thing, entry, or otherwise, have you seen to refresh your memory so as to fix it as a fact? Confine yourself to answering that question specifically.

Ans. I have seen no entry that refreshed it. I haven't looked at any entry but one in the books.

Int. 305. Do you remember when the amount due from M'r Hayward was figured up, preparatory to making the sale in September, 1868,

whether you looked or saw the two memoranda made making the $26,500 named?

Ans. I've no recollection of seeing the memoranda. I might, but I've no recollection particularly of seeing them. I wasn't accustomed to examine the memoranda at all.

Int. 306. Do you remember whether at that time there were any indorsements on the memorada at all; and, if any, what?

Ans. Well, I didn't examine them. I could not remember that.

Int. 307. You say in your answer to the 119th question, put by complainant in cross-examination, in substance, that you have said before, and so thought after this suit was begun, that you spoke to M'r Hayward about a balance due from him to the bank on the Hecla loans after Sept. 8, 1868. Now, will you tell to whom you so stated?

(Objected to as assuming what he hasn't said.)

Ans. I think I stated it to M'r Robinson at the first meeting after he sued. I think M'r Ranney was present.

Int. 308. Where was that meeting.

Ans. At M'r Robinson's house. It was not by appointment. It was accidental.

Int. 309. What did you then think and state on that subject, that is, about your speaking to M'r Hayward about a balance due on the Hecla stock? Confine yourself to answering that.

181 Ans. I don't think I said a great deal about it. I had thought very little about it at that time.

Int. 310. Were you of the same opinion and recollection or not at the time when M'r Conant subsequently read to you the answer filed in this suit?

Ans. I hadn't thought but a very little about it. I had said nothing to anybody about it at the time except at M'r Robinson's house.

Int. 311. When did you come to the conclusion that it was utterly impossible that you spoke to M'r Hayward about a balance after Sept. 8, '68?

Ans. Well, some time ago. I couldn't fix the date. I looked up all the circumstances connected with it. I couldn't fix a date connected with it. I've looked it up in my own mind.

Int. 312. How recently was that conclusion found in your mind? Fix it as nearly as you can.

Ans. Oh, well, I couldn't fix the time. I can't fix the date.

Int. 313. Fix it as nearly as you can.

Ans. Five or six months ago.

Int. 314. When and where were you when it dawned upon you?

Ans. I can't tell you.

Int. 315. Were you on the way to Damascus?

Ans. I answered before. I can't tell you where I was. I can tell you some circumstances connected with it.

Int. 316. Will you state to whom you first mentioned this change in your recollection, and when and where it was?

Ans. I think I've stated it here. I think I've mentioned it to M'r Ranney since; two or three mornings before coming down; some time before. I couldn't fix the time.

Int. 317. Fix it as nearly as you can in reference to the time of your beginning your testimony here.

Ans. It wasn't a great while ago. It was after M'r Robinson testified; you told me that he had testified.

Int. 318. Then you never have, since the suit was brought, since the

answer filed, until the time you have named, when you say you mentioned it to me, mentioned the fact to any person, have you?

Ans. I don't think I have that, in those precise words.

182 Int. 319. You say you have not in precise words; have you in substance; if so, to whom?

Ans. Nobody that I know of.

Int. 320. Had you to anybody you didn't know?

Ans. I don't think I did.

Int. 321. Had you written it on paper anywhere, or any sort of paper?

Ans. No, sir.

Int. 322. Have you ever up to this time written it on any paper?

Ans. Unless I was asleep, I didn't do it. I never have known that I had.

Int. 323. How near the time of your being at my house at the time you say you communicated it to me, was it that you came to the conclusion that you didn't see Mr. Hayward about a balance due on the Hecla stock after Sept. 8, '68?

Ans. Three or four months ago—four or five months ago, I suppose.

Int. 324. Can't you fix the time and circumstances and place where you came to that conclusion?

Ans. While I was thinking of it from time to time. No particular day.

Int. 325. Before coming to the conclusion that what you had originally thought and stated was erroneous in this respect, did you go to confer with M'r Conant on the subject?

Ans. I have said but very little to M'r Conant; very little, indeed. I wished him to act from his own memory.

Int. 326. Did you see him or speak with him at all upon the subject when you began to doubt about it, or before you came to a different conclusion?

Ans. I don't think I did. I've no recollection of it.

Int. 327. Did you with either of the other officers or directors of the bank?

Ans. I have no recollection of speaking to either of the other officers of the bank about it.

Int. 328. Did you with the counsel who you knew had the defence in charge?

183 Ans. I never talked with him about it except at the first meeting when I met him at M'r Robinson's. I never alluded to the suit, with one exception, I think.

Int. 329. After you began to doubt whether what you thought and stated subsequent to the commencement of this suit about seeing M'r Hayward about a balance due, and before you came to a different conclusion, did you go and take any steps to see and examine the books of the bank and the entries that might throw any light on the subject?

Ans. I can't say I did in reference to this particular thing in question.

Int. 330. Have you ever until after you had given your testimony on the subject in the suit, and your cross-examination had begun and proceeded and reached the subject, that is, have you examined the books and the entries in the books as far as they relate to the subject-matter?

Ans. I never have.

Int. 331. Have you done it now?

Ans. Only looked at one or two entries.

Int. 332. What one or two entries have you looked at?

Ans. The amount of items credited, $26,500, and the $375 that was credited as interest.

Int. 333. Have you looked to see whether in making up the amount due from M'r Hayward to the bank on the 8th day of September, '68, as the amount for which the stock was sold and which the notes given by the purchasers covered, the interest was computed at 6 or 7 per cent. ?

Ans. I have not.

Int. 334. Have you looked to see whether in that amount so determined as the amount due from M'r Hayward at that time, for which the Hecla stock was held, the said surplus growing out of the sale of the government bonds was included and allowed to his credit ?

Ans. I have not, sir.

Int. 335. Have you taken the amount ascertained and determined to be due from M'r Hayward to the bank on this Hecla loan, reckoned the difference between 6 per cent. and 7 per cent. on the loan for April 1, 1867, and allowed the surplus stated, arising from the sale of said government bonds, and, on the assumption that the account is corrected in that way or on that basis, seen what the balance is ?

Ans. I have not.

184 Int. 336. Have you looked to see and sought to ascertain in any way whether the said surplus arising from the sale of said government bonds had on the 8th of Sept., 1868, ever been allowed or credited or paid to M'r Hayward in any account or way whatever ?

Ans. I have not. I saw the credit on the books; credited to interest account.

Int. 337. Had M'r Hayward, after the government bonds were sold and the debt for which they were held as collateral liquidated thereby, any other loan in the bank except those loans called the Hecla loans, to your knowledge ?

Ans. No, sir.

Int. 338. Then if the said surplus referred to was to be or should have been applied on the interest account, then on what loans was it or should it have been applied as interest or on payment of interest ?

Ans. He had no other loan but the loan on the Hecla stock. It must have been applied to this.

Int. 339. On the 8th of Sept., 1868, under your agreement with M'r Hayward, what rate of interest did you understand he should pay ?

Ans. 7 per cent.

Int. 340. Will you look again at Exhibit 21, being the account which M'r Hayward produces as rendered to him after the sale was made, and state whether in that account the interest was reckoned at 6 or 7 per cent. ?

Ans. I haven't figured it.

Int. 341. Will you examine and figure it yourself sufficiently to enable you to determine and state ?

Ans. I will.

Int. 342. Will you state whether in that account the said surplus arising from the sale of government bonds is or is not embraced ?

Ans. It is not here.

Int. 343. Then if M'r Hayward, on the 8th of September, '68, when he is allowed for the sum stated in that account, as the proceeds for which the stock sold was not credited, and had not been allowed the said surplus arising from the sale of said government bonds, there was an error, in fact, on that account, was there not ?

Ans. I see it was 6 per cent., and he agreed to pay 7.

185 (Question repeated, and examiner asked to repeat the question again to the witness.)

Int. 344. (Question read again to witness.)

Ans. I don't think I can change my answer.

Int. 345. When you say, in first answering the last question, that there is an error in the interest being figured at 6 instead of 7 per cent., had you figured and ascertained whether in that account the interest was figured at 6 or 7 per cent. since you said in answer to another question that you didn't know and would figure and see?

Ans. I haven't figured this account.

Int. 346. Do you now know whether in fact the interest is figured in that account on the debit side at 6 or 7?

Ans. I can't tell without figuring it.

Int. 347. Then I repeat the question to you, and will you be kind enough to state whether the omission to credit the amount of surplus arising from the sale of government bonds in this account was or was not an error?

Ans. It must be.

Int. 348. And if the interest in that account was reckoned at 6 instead of 7 per cent., was that or was it not an error?

Ans. It is not according to my agreement with him.

Int. 349. If, then, the account was made up on the books of the bank on the 8th of September, '68, in the loan account and on the debit side at 6 per cent., and cancelled by a credit of the amount so made up as the avails arising from the sale of the stock, the books would show a balance of $375.03 that was due M'r Hayward, and that the bank ought not to hold, wouldn't it?

Ans. Yes.

Int. 350. If the accounts of the bank were properly kept, the cash of the bank on a proper balance would then appear so much over, would it not?

Ans. Yes, sir.

Int. 351. Will you state whether after that time, to wit, the 8th of September, '68, the errors arising out of the casting of the interest at 6 instead of 7 per cent. and not crediting the surplus was or was not discovered?

Ans. There was an error discovered.

186 Int. 352. Who discovered it?

Ans. It was discovered on the return of M'r Conant.

Int. 353. Was it or not made known to you?

Ans. It was.

Int. 354. By whom?

Ans. Either M'r Conant or M'r Harrington, I couldn't say which; one of the two.

Int. 355. Was it on paper or orally?

Ans. I think it was orally. I remember we had a little talk about it.

Int. 356. Did he show you the figures?

Ans. I don't think he did.

Int. 357. Do you remember whether he had a statement of it on paper.

Ans. I do not.

Int. 358. Do you mean that you don't remember whether he did or not?

Ans. I don't think he had.

Int. 359. Do you feel confident?

Ans. It is one of those things I shouldn't want to say positively—that he had no statement of it.

Int. 360. Do you remember after correcting the two errors named what the balance due from M'r Hayward was as it appeared in this statement?

Ans. I do not.

Int. 361. State as near as you can.

Ans. I couldn't state.

Int. 362. Give us your best recollection and impression.

Ans. I couldn't change it.

Int. 363. Have you no idea whether it was 100 or 500, or less?

Ans. I think it was less than 500. I don't think I saw the balance.

Int. 364. According to your best recollection, how near the sum of $62.52 was it?

Ans. I have no recollection of the balance.

Int. 365. Have you not up to this time taken any steps to ascertain it—that is, what it would be if the account was properly corrected?

Ans. M'r Conant told me what the balance was.

Int. 366. When did he tell you?

187 Ans. Not long ago.

Int. 367. Since you've been testifying, or before in this case?

Ans. I think before.

Int. 368. When, and under what circumstances, and on what occasion?

Ans. I couldn't tell you, really.

Int. 369. State as near as you can recollect.

Ans. I can't recollect the circumstance now.

Int. 370. Can't you recollect the place where it was?

Ans. I think 'twas in the bank; I know it was.

Int. 371. How long ago?

Ans. I couldn't fix the date.

Int. 372. Before or after the commencement of this suit?

Ans. Since the commencement of the suit.

Int. 373. Before or after he read the answer to you?

Ans. Since the answer, certainly he has.

Int. 374. Did he before?

Ans. I think likely he did, but couldn't say that he did.

Int. 375. What did he tell you it was?

(Objected to as calling for the statement of others.)

Ans. Some sixty-odd dollars.

Int. 376. Have you looked yourself to see what the balance would be after correcting of errors in preparation for your examination here or during the time of it?

Ans. I took M'r Conant's figure. He showed me what it was.

Int. 377. Do you recollect when you were talking with me and M'r Robinson, in preparation for the answer in the case, of your stating the amount of the balance as the amount for which you called on M'r Hayward to pay, and which he promised to pay when he was able?

Ans. I remember of telling of it, but had not the slightest idea it was for an answer.

Int. 378. Do you recollect the amount you then told?

Ans. I think about sixty dollars; I know it was.

Int. 379. Have you any memory of remarking it was sixty-two or sixty-three dollars, and then speaking of what a good memory you had as to the amount?

Ans. I think there was something to that effect.

188 Int. 380. And your recollection then was that that was the sum for which you called on M'r Hayward and which he promised to pay?

Ans. Yes.

Int. 381. Did you or not know at that time that I was inquiring into the facts with the view of defending said suit and of ascertaining the facts?

Ans. I think I employed you myself a few days before.

Int. 382. What is the difference between the interest at 6 and the interest at 7 per cent. on the Hecla loan, so-called, from the time of the commencement to the 1st day of April, 1867? State it in figures, and confine yourself to answering the question put.

Ans. I make it $119.62.

Cross-examination resumed:

Cross-int. 139. Had you anything to do with making the list of sums due as interest from the parties who were indebted for temporary loans preparatory to making out the dividends?

Ans. Not as a general thing.

Cross-int. 140. Had the $375 surplus anything to do with the Hecla loan?

Ans. I think not.

Cross-int. 141. When the $375.03 surplus was entered as interest in the books of the bank, would it not make the bank balances right and keep the cash square?

Ans. I don't think it would. The tellers balance their accounts every day.

Cross-int. 142. If, then, that sum was entered as interest, why would it not account for the possession of that much money on the one side and the receipt of it on the other, and thus the account be balanced?

Ans. It would.

Cross-int. 143. Was your original agreement with M'r Hayward to pay 6 per cent. or 7 per cent.?

Ans. I don't think there was any agreement about it.

Cross-int. 144. When, then, you have spoken of his agreement to pay 7 per cent., you refer to an arrangement or agreement made with him after the loan was made, do you not?

Ans. Yes, sir.

189 Cross-int. 145. That arrangement is the one you have spoken of as occurring after the first of April, 1867, and about that time?

Ans. Yes, sir.

Cross-int. 146. You have said that an error was discovered on M'r Conant's return to the bank, after Sept. 8, 1868. Was anything said by him or you, at that time, or anything put upon paper, at that time, relating to the $375.03?

Ans. He told me that he had discovered an error.

Cross-int. 147. Did he tell you anything about the $375.03 at that time, or simply that he had discovered an error in casting interest at 6 instead of 7 per cent.?

Ans. He said he had discovered $375.

JOHN DEMERITT.

Deposition of E. P. Adams.

APRIL 18, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. What is your name, age, residence, and occupation?

Ans. E. P. Adams; 26; Newton Lower Falls; discount clerk in the Eliot National Bank.

Int. 2. State whether you were in the employ of the bank on the 8th of Sept. '68; and, if so, in what capacity there.

Ans. I was discount clerk.

Int. 3. Will you state whether you are the M'r Adams who, on the 8th of Sept. '68, went to the office of the Hecla Mining Co., and transferred 450 shares of stock, which the bank had held previously as collateral security for a loan, or loans, to M'r Hayward, in equal division to M'r Robinson, M'r White, and M'r Goodwin?

Ans. I am.

Int. 4. Who, if any one, delivered to you the certificates of stock which you carried to the office for transfer and directed you to do it?

Ans. I received the certificates and instructions from M'r Demeritt, the president of the bank.

190 Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. Have you at this moment any recollection of M'r Demeritt's giving you instructions on that subject?

Ans. I have.

Cross-int. 2. Did he while president of the bank frequently, daily perhaps, give you instruction concerning the transaction of business?

Ans. I should say not frequently.

Cross-int. 3. Did he every week?

Ans. I could not say as to that. Whenever he required my services, I suppose.

Cross-int. 4. Could you remember every case in which he required your services?

Ans. I couldn't say.

Cross-int. 5. Have you any data by which you are able to say that M'r Demeritt handed you the certificates referred to on the 8th of September, '68?

Ans. I remember that he handed me the certificates. The date I only remember from the date of the transfer, which was on the same day he handed them to me.

Cross-int. 6. Have you ever seen the transfer since that day; and, if so, when and where?

Ans. I have not seen the transfer. I've seen the certificates.

Cross-int. 7. What certificates, and when and where have you seen them?

Ans. The certificates of stock—I am not quite certain that there were two—say certificate or certificates. I saw them at the Eliot Bank. As to when, I cannot set the day. Within three months; perhaps longer.

Cross-int. 8. In whose hands?

Ans. I don't think any one had them.

Cross-int. 9. To whom did the certificates run; that is, who purported to be the owner? I mean, who owned the certificate you saw, and in whose names, or whose name was inserted as the shareholder?

Ans. The certificate that I refer to was made, I think, to R. B. Conant, cashier, as collateral. It was indorsed by me by attorney.

191 Cross-int. 10. You think you have seen that certificate in the bank within a year?

Ans. I think so.

Cross-int. 11. That is the certificate you referred to as handed to you by M'r Demeritt to transfer?

Ans. I could not say. I have no way of establishing the identity of the two.

Cross-int. 12. Will you, then, say what certificates you refer to in your answer to the third direct interrogatory?

Ans. The certificates of stock of the Hecla Mining Co. left as collateral by M'r Hayward and handed to me by M'r Demeritt for transfer.

Cross-int. 13. Did you transfer the stock named in them?

Ans. I did.

Cross-int. 14. If you have not seen your transfer of those certificates, state how it is that you remember the fact after so long a time, if you can?

Ans. Only as I remember anything; by the action of my brain, I suppose.

Cross-int. 15. Did you transfer them by indorsing on the back of them some name as and by attorney; and, if so, what name?

Ans. I indorsed on the back of them my name by attorney; E. P. Adams, by attorney.

Cross-int. 16. And left them in the office of the Hecla Mining Co., did you, so indorsed?

Ans. I suppose so, from the usual course of business. I took the new certificates and receipted for them.

Cross-int. 17. Did you put any other name on them than your own?

Ans. I must have, to sign by attorney.

Cross-int. 18. Do you remember putting any other name on the back of those certificates than your own; and if you did, whose name?

Ans. I don't know as I recollect the fact of putting any other name, only that I did do so. Probably in the name of the bank by its president.

Cross int. 19. Do you speak of this from a recollection of the fact itself, or only from your knowledge of the course of business?

Ans. I recollect the fact of transferring the stock.

Cross-int. 20. In whose presence did you transfer that stock?

Ans. One or more officers of the company in their office.

192 Cross-int. 21. Was it one or more than one?

Ans. I am quite certain there were more than one in the office. I don't know that they saw the act of transfer.

Cross-int. 22. Which one saw the transfer and acted with you in making it?

Ans. I could not say.

Cross-int. 23. What time of day was it?

Ans. Between the hours of nine and two.

Cross-int. 24. That's as near as you can state it?

Ans. I only know 'twas in the hours of business.

Cross-int. 25. Don't you know, then, sir, simply from the regular course of business and not because you have a recollection of the hours or time of day at which it was done?

Ans. I have a recollection that it was during business hours.

Direct examination resumed:

Int. 5. Whether at the time, on the 8th of September, when the cer-

tificates were delivered to you by M'r Demeritt for transfer, M'r Conant was at the bank or where he was?

Ans. I should say that he was not at the bank for one reason—from the fact of his not transferring the stock, and for another—that I recollect that I was working very hard at that time, probably on some of his work. Where he was I couldn't state.

Int. 6. When you say in transferring the stock you signed on the back of the certificate which you carried, will you consider and refresh your recollection, if necessary, and state on what you put your signature?

Ans. I may have confused signing in the margin, in receipting for the certificates, with signing on the back of the certificates.

E. P. ADAMS.

193 *Deposition of George A. Curtis.*

APRIL 21, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. What is your name, age, residence, and occupation?

Ans. George A. Curtis; 61; 780 Washington street, Boston; president of the Eliot Insurance Co.

Int. 2. State whether you were ever, and, if ever, how long, a director in the Eliot National Bank.

Ans. I am a director. I couldn't tell exactly, but I think about eleven or twelve years.

Int. 3. State whether you knew the complainant, Cha's L. Hayward; and, if so, how long have you known him?

Ans. I do know him. I think about twenty-three years.

Int. 4. Were you aware of the loan of about $26,500 that was made about Oct., 1866, and remained in the bank until Sept. 8, 1868, for which Hecla stock was pledged as collateral?

Ans. I was.

Int. 5. If you, before Sept. 8, 1868, when the stock was sold and transferred to three of the directors, saw M'r Hayward about it, in reference to his redeeming the stock or paying the loan, state what was said about it.

Ans. I did see M'r Hayward, at the request of the board of directors, at his office in Post-office avenue. I stated to him what I called for, to see if he could do something to take up his loan, or take that stock out of the bank which the bank held as security. He stated to me that he could do nothing now in relation to it, as he had nothing, and the only thing that the bank could do was to sell that stock for the most they could get, and if he was ever able to he would pay the balance after the sale of the stock. I asked him if he had no friend that could help him take this stock out of the bank and hold it for him. He said no; and I asked him if his brother wouldn't help him—give his note, or something of that kind, to help him take the stock. He said no. I then asked him if he couldn't give the bank a mortgage on his house. He said he could not, as his wife owned the house. He then said that I could see no other way than for the bank to sell that stock.

194 He repeated those words two or three times at the interview I had with him. He said if the man who had ordered him to buy that stock had taken it, he would have been all right. He stated in the course of the conversation that he had stated those same things to others of the directors who had called upon him. That seemed to be the general amount of what was said.

Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. Were you in Boston between July, 1868, and September, 1868, or were you absent?

Ans. I was in Boston.

Cross-int. 2. Do you remember anything about the bank's obtaining from M'r Hayward a written authority to sell that stock about Nov. 9, '67?

Ans. I knew they had such a document. I cannot tell the date.

Cross-int. 3. Do you recollect the fact of its being obtained? I don't mean when it was obtained, but the fact of its being obtained; and had you anything personally to do with obtaining it?

Ans. I knew the fact that it was obtained, or that the bank had such a document. I don't know how it was obtained. I know such a document was in the bank.

Cross-int. 4. Do you remember the price, or about the price, of the Hecla stock at the time the conversation you have mentioned took place?

Ans. No, sir.

Cross-int. 5. Do you remember whether there had been any assessments paid upon it at that time by the bank?

Ans. I knew there had been.

Cross-int. 6. Do you remember whether any assessments were paid by the bank after that, referring always to the conversation you had with M'r Hayward?

Ans. No, sir; I don't remember.

Cross-int. 7. At that time was not the market-price of the stock very much below a price sufficient to pay M'r Hayward's debt?

Ans. So I understood.

Cross-int. 8. Do you remember whether you were present at a meeting of the board of directors on the 17th of August, 1868? To
195 mark the meeting, I add that was the meeting at which, in the answer to this bill, the bank asserts that a vote was passed authorizing the president to sell the stock if M'r Hayward did not pay certain sums of money within certain specified times.

Ans. I think I was at that meeting.

Cross-int. 9. Can you now state the time when you had said conversation with M'r Hayward?

Ans. I cannot recollect the exact time, but my impression is it was in the winter of '67, or the spring of '68.

Cross-int. 10. Was it not in pursuance of that conversation that the bank procured the written order from M'r Hayward to sell that stock, which order is asserted in the answer to bear date Nov. 9, 1867?

Ans. That I cannot say. I think that order was written before I saw him. That I would not be certain about.

GEO. A. CURTIS.

Deposition of Joseph H. White.

APRIL 21, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. Have you already given your testimony in this case for the defendant?

Ans. I have.

Int. 2. Since you testified something has been said about a statement of M'r Demeritt, some time in this transaction, about him or the bank

agreeing to take the stock at some time afterwards. Will you state how that was; what was said on that subject, and when it was said, and all about it, if anything?

(Objected to.)

Ans. After we had purchased the stock and the transaction was completed, M'r Demeritt made a remark and said he thought we had made a good bargain, and said that if we or any one of us were dissatisfied with our purchase, he would take the stock off our hands at any time in the six months. M'r Goodwin had a little hesitation about taking his third of the stock at the time we were negotiating for it. I proposed myself to take half the stock, or take M'r Goodwin's third,
196 if he didn't feel satisfied with the purchase. I made him the proposition several times. While this negotiation was pending M'r Demeritt went out to consult with M'r Hayward, and returned to the bank and reported that M'r Hayward consented and approved of the sale to the directors. I asked M'r Demeritt if he told M'r Hayward who the purchasers were. He replied that he did, and gave him the names of the three directors that were to purchase it.

Int. 3. Did you at the same time that Demeritt made this remark, or at any time, make any, and if any, what remark, about what you would do?

Ans. I stated before this that I would be one of one, two, or three that would take the stock at a price that would cover the Hayward loan, interest, and assessments. M'r Robinson and M'r Goodwin each concluded to take a third, and I took the other third.

Int. 4. Will you state again particularly at what stage of the transaction M'r Demeritt made that remark which you have given?

Ans. Not till all negotiations had been concluded and the matter fully settled, and as we, the directors, were about leaving the room to go away.

Int. 5. Was it before or after the notes had been given by the purchasers, and the certificates of stock delivered?

Ans. I think it was after the stock had been delivered to us, and we had given the notes.

Int. 6. Was Demeritt's remark that he would take the stock, or that the bank would take it back?

Ans. That he would take the stock. I considered it a mere casual remark that he made, and never thought anything more of it from that day to this.

Int. 7. Was anything said at the time about the bank's having a right to take the stock back, if they wanted to, at any time?

Ans. No; there was not.

Int. 8. As a matter of fact, during the following six months was the stock lower or higher?

Ans. It was lower.

197 Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. In answer to the 6th interrogatory, speaking of M'r Demeritt's remark about taking back the stock, you say it was a "casual remark," and also that you hadn't thought of it from that day to this. You remember that casual remark so as to be able to swear to it, and its exact relations in point of time to other transactions at this day, do you?

Ans. Yes. What I meant by not thinking of it since was that I had not given a thought to that matter.

JOSEPH H. WHITE.

Deposition of Ambrose A. Ranney.

APRIL 22, 1873.

My name is Ambrose A. Ranney; my residence, Boston; business, counsellor at law since June, 1848.

The statement made by M'r Demeritt that he had told me or intimated to me that his recollection had changed in reference to the time when he called upon M'r Hayward for the balance of about sixty dollars, of which he has testified, is erroneous, and he, in my judgment, is mistaken about it. He did converse with me about what he said to the directors in reference to taking the stock back at the time of the sale, before I called him as a witness; but from the time of seeing him and getting his statement in preparation for an answer to the suit to the time of his being examined as a witness in this case I had no information or intimation from him, directly or indirectly, that his recollection had changed on the point of the balance since he first gave it to me in the preparation of the answer. And his testimony upon that point, given in cross-examination, was an entire surprise to me and my clients, so far as I know.

No cross-examination.

AMBROSE A. RANNEY.

198 *Deposition of E. P. Adams.*

APRIL 22, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. You have given testimony before in this case for the defendant, have you?

Ans. Yes, sir.

Int. 2. Since you testified two papers have been produced and put in evidence by defendant, marked Exhibits 26 and 27. Will you be kind enough to look at the same and state in whose handwriting the written parts of the notes are, both in the bodies and the indorsements thereon?

Ans. They were written by myself. They are copies.

Int. 3. If you copied them, state from what you copied them?

Ans. From the original documents of exactly the same tenor and date.

Int. 4. Where did you get the originals from which to make copies?

Ans. I cannot say positively. I think from the cashier, M'r Conant.

Int. 5. Had you ever seen the originals before referred to and shown to you for the purpose of making copies?

Ans. I can't say that I did before making copies.

Int. 6. State whether they are or not exact copies of the words written on those notes when you copied them?

Ans. They are precisely like the originals from which they were copied.

Int. 7. After you made the copies, state whether you compared the copies with the originals, with anybody else?

Ans. I think I did with the cashier, M'r Conant.

Int. 8. State what you did with the originals after you copied them.

Ans. I returned them to the person from whom I received them; I think M'r Conant, the cashier.

Int. 9. State, if you know, where the originals are now, and whether

you have seen them since, and what you know of them, and what has become of them?

199 Ans. I don't know; I don't think that I have ever seen them since.

Int. 10. State what, if any, search has recently been made for them, to your knowledge?

Ans. I don't know of any.

Int. 11. Have you been in custody of them, or is it a part of your duty to hold and take care of such papers?

Ans. No, sir. They formed part of the temporary loan and would be in the custody of the cashier.

Int. 12. Will you state when it was, as near as you can, that you made the copies referred to as Exhibits 26 and 27?

Ans. I cannot.

Int. 13. State how long ago it was, to the best of your recollection; if you can't state the exact date, give it as near as you can.

Ans. I should think some time ago; at least three or four years. I have no clear recollection.

Int. 14. Do you remember the occasion of their being made and the purpose for which they were wanted?

Ans. No, sir.

Int. 15. Did you know of the fact of this suit of Hayward's being begun by hearing of it or otherwise?

Ans. By hearing of it.

Int. 16. Do you recollect whether it was before or after the time you heard of it that you made these copies?

Ans. No, sir.

Int. 17. If you know of any place where those notes are or are likely to be in the bank or elsewhere, will you search and see if you can find the originals?

Ans. I have no idea where they are or where they could be.

Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. You are called upon in your position at the bank very frequently to make copies of notes, are you not?

Ans. Sometimes; I will not say very frequently.

Cross-int. 2. Every day, or every week, or every month?

Ans. Not either.

200 Cross-int. 3. You mean, I presume, not as frequently as once a month?

Ans. Yes, sir.

Cross-int. 4. In making copies of Exhibits 26 and 27, I presume it was your purpose to make them not only exact copies, but to place the written words as nearly in the same position upon the copy that they were in the original; is that so?

Ans. Yes, sir.

Cross-int. 5. And the indorsements were made so that the words are substantially in the same relative position, lines, etc., as in the original, are they?

Ans. Yes, sir.

Cross-int. 6. For example, the word five, in the indorsement of 375.03 in Exhibit 27, was written in the original in the same way it is there, was it?

Ans. I should say the $5.\frac{03}{100}$ was meant to be on the same line with the line above, but the breadth of the note would not permit it.

Cross-int. 7. Have you any distinct recollection of making those

copies, or do you speak from observing that they are made in your handwriting?

Ans. From observing that they are made in my handwriting.

Cross-int. 8. Have you now a recollection so that you can speak with confidence, in whose handwriting the written parts of the original notes are in?

Ans. No, sir.

Cross-int. 9. I presume you make the same answer as to the handwriting of the indorsements?

Ans. No, sir. I think I have a recollection of the indorsements.

Cross int. 10. In whose handwriting were the words, "Interest paid to April 1st, 1867," upon each of those notes? I speak of the originals, of course.

Ans. As I recollect they were in the handwriting of the cashier, M'r Conant.

Cross-int. 11. In whose handwriting was the line under the words above named on the paper of which Exhibit 21 is a copy—the second line as it appears in the exhibit?

Ans. I think in the same handwriting.

201 Cross-int. 12. In whose handwriting was the last line and the date on the same paper?

Ans. I think in the same. As I recollect, they were all in the same handwriting.

Cross int. 13. Do you know M'r Hayward's handwriting?

Ans. No, sir.

Cross-int. 14. Then, when you say these are copies of original notes, you wouldn't mean to assert that those notes were signed by C. L. Hayward in his own proper handwriting of your own knowledge, would you?

Ans. No, sir.

Cross-int. 15. If you have a distinct recollection of the appearance of those notes and the indorsements, will you say whether all of the indorsements on the note of which Exhibit 27 is a copy were made in your opinion with one pen and ink, and at the same time, or not?

Ans. I should think not.

Cross-int. 16. Will you designate which, in your recollection, of those three lines were made at the same time?

Ans. I don't think that I could.

Cross-int. 17. Do you remember whether the second and last lines were made apparently at different times or at the same time? Of course, I refer to the originals.

Ans. I do not.

Cross-int. 18. You have, then, simply a recollection that the indorsement on Exhibit 27 did not seem to be made at the same time. Have you such recollection, or do you speak reasoning from the difference in the dates of these indorsements?

Ans. From recollection.

Cross-int. 19. Do you recollect whether the writing in the body of the notes was made apparently with the same pen and at the same time with any of the indorsements?

Ans. I should say not.

Cross-int. 20. Will you say that you did not make those copies within one year from the time?

Ans. I will say that I think I did not.

Cross-int. 21. Do you remember to have made any copies of notes held by the bank since making those?

202 Ans. Several; I don't know whether you mean in the bank or outside in my capacity as notary. I make them every day as notary.

Cross-int. 22. I refer to notes held by and remaining in the bank.

Ans. I can't say that I have.

E. P. ADAMS.

Deposition of Royal B. Conant.

APRIL 18, 1873.

Direct examination by A. A. Ranney, esq., of counsel for defendant:

Int. 1. Will you state whether you have given your testimony before in this case, being called by the complainant?

Ans. I have, sir.

Int. 2. When M'r Hayward paid the interest on the two loans in question in this case on the 1st of April, 1867, what amount of interest did he pay? State the sum.

Ans. $837.66.

Int. 3. State at what rate of interest that was cast.

Ans. At the rate of 7 per cent.

Int. 4. Have you the book of the bank containing the original entry of the payment of that interest?

Ans. I have.

Int. 5. Will you produce it and show the entry and give the name of the book, the page, and read the entry, so that a transcript of it may be made in your answer?

Ans. I will; and now produce it. Entered to the credit of interest under date of March 27, under which date all credits of temporary loans in the bank were entered to the credit of interest in book called Bank Balances, 1. The entry was made in connection with the rest on the 27th of March, 1867, for the reason that it was my practice, in making up the semi-annual statement for dividends, to make up all the interest on all the loans in the bank to enable the directors to see what the earnings were previous to declaring a dividend. This interest was figured up to the 1st of April, although entered on the 27th of March, on all the loans in the bank. This was necessary, as the directors passed
203 upon the dividend a few days previous to the paying out in order to be prepared to pay out.

Int. 6. Will you read the entry of the payment of interest on the book referred to?

(Objected to.)

Ans. Interest account credited March 27, 1867, T. L. (indicating temporary loan), C. L. H. (indicating C. L. Hayward), 837.66, in book Bank Balances, 1.

Int. 7. Will you state how you know, then, that the sum you have named as the sum paid on the loans of M'r Hayward, for which the Hecla stock was paid as collateral, was paid on that loan?

Ans. Both by the original entry on the books, and by the fact that the interest at 7 per cent. on $6,500, from Oct. 17, '66, to April 1, '67, and interest on $20,000, from Oct. 19, '66, to April 1, '67, at 7 per cent., amounts to $837.66.

Int. 8. Will you state when the government bonds pledged by M'r Hayward for another loan were pledged, and when sold, and for what they were pledged?

Ans. They were pledged for a loan. Were sold, I think, Sept. 3, '67.

The date of the borrowing of the money I haven't in my mind, and I shall have to refer to my books, though I can state explicitly upon reference to entries.

Int. 9. Will you state whether the said government bonds were pledged on the loan of $6,500, or the loan of $20,000 referred to, or some other loan?

Ans. They were not pledged for the first of these two mentioned loans, but for some other loan.

Int. 10. When the bonds were sold, what was the surplus above the loan for which the bonds were pledged?

Ans. $375.03.

Int. 11. On the 8th of September, 1868, had that surplus or not been credited on the other loans named, or in that account, or where did it stand, if it had not?

Ans. It was not credited by entry on the books to C. L. Hayward, but held for benefit of—open account I should think you'd call it—and applied upon the settlement of the loan.

Int. 12. Will you look at Exhibit 21, being account produced
204 by the complainant as rendered to him, and state whether that surplus entered into that account?

Ans. It did not, sir.

Int. 13. In the account contained in Exhibit 21, at what rate of interest is the debit made up?

Ans. 6 per cent.

Int. 14. When the account was made up correcting the error allowing in credit the surplus named as the surplus arising from the sale of the government bonds, and casting the interest at 7 per cent., and determining the difference between the interest allowed at 6 and 7 per cent., and what was the balance after these different computations and corrections were made; was it before or after Sept. 8, 1868?

Ans. At the time the account was rendered I was absent from the bank. In reviewing what had transpired in my absence, the matter, in common with others, came to my notice. It was then I observed the account was made at 6 instead of 7 per cent.

Int. 15. State what you did thereupon, if anything.

Ans. Figured the difference between 6 and 7 and found the difference in the account, after allowing the surplus and interest on the same to be $62.52.

Int. 16. In whose favor was the balance of $62.52?

Ans. Balance due the bank from M'r Hayward.

Int. 17. What did you do about that balance, or collecting it, or having it collected, if anything?

Ans. I did not do anything further than to refer it to M'r Demeritt, who had the handling of it.

Int. 18. State whether you did or did not communicate the facts to him or give him a statement of it.

(Objected to.)

Ans. Not to M'r Hayward; but to M'r Dremeritt.

Int. 19. Do you recollect whether you gave a statement of it to him orally or on paper? State how it was.

Ans. Well, I think verbally and on paper both. That is my impression.

Int. 20. Do you know what he did with it or about it afterwards? If so, state.

(Objected to, and counsel for complainant asks the examiner to
205 caution the witness to speak only what he knows from personal knowledge, and not what any one reported to him.)

Ans. I can state what was reported. I did not see him or hear him talk personally with M'r Hayward.

Int. 21. If anybody made any report about it, state who made it. I don't ask you now what they reported, but simply if there was a report and who made it, if there was a report?

Ans. The substance of the interview was communicated in the conversation with M'r Demeritt.

Int. 22. What did M'r Demeritt report and say? State fully, as near as you can.

(Objected to.)

Ans. It was understood between M'r Hayward and himself that if he was able he would pay the difference; that was about the idea I got.

Int. 23. Do you mean that that was what M'r Demeritt reported, or did you get your information elsewhere?

(Objected to.)

Ans. The impression I got in conversation with M'r Demeritt.

Int. 24. State what M'r Demeritt said on that subject in words and substance as near as you can.

(Objected to.)

Ans. It was the understanding between himself and M'r Hayward that if he was ever able he would pay the difference.

Int. 25. Did you know or hear anything of M'r Demeritt going to see M'r Hayward again, and of his reporting any interview about it subsequently to the report named?

(Objected to.)

Ans. I am not quite clear, but think no.

Int. 26. You have stated in your previous examination that you signed and swore to the answer in this case; will you state whether or not before doing so you showed or read that answer to M'r Demeritt, the president?

(Objected to.)

Ans. I read the same to him and consulted with him before signing it.

Int. 27. Did he or not make any objection or deny or controvert any of the facts therein stated?

206 (Objected to)

Ans. No, sir.

Int. 28. When you read this part of the answer, to wit: "That in making said sale the purpose and proposition was to sell the stock at a price which would cover the said indebtedness entirely, and it was supposed at that time, according to figures of a clerk in making up the account, that this was done; and the borrowed and received memorandums, which said complainant gave at the time for said loans, and which the defendant still held, were given to the president of the bank, John Demeritt, to be delivered to him; but it was found by him or the cashier, on an accurate or more careful computation, that there was a balance of about sixty dollars then due; that this was stated to complainant by the president of defendant's corporation, and he agreed that it was so and promised to pay that balance soon, or as soon as he could do so, and then would take up the memorandums and close up the matter; that he delayed doing so from alleged inability or want of means, and the matter on this account remained *in*adjusted so far as the payment of said balance was concerned, but not otherwise;" did M'r Demeritt make any objection to this statement of the facts or ask that any correction of it might be made?

(Objected to.)

Ans. He did not. I asked him if I should sign it. He said, "Yes."

Int. 29. Did you on the 1st of April, '67, or at any time thereafter, figure up the difference of the loans for which the Hecla stock was held, reckoning what the difference would be between the interest at 6 and 7 per cent. from the time of making the loan to the 1st of April, '67, and give that to M'r Demeritt for correction?

(Objected to.)

Ans. I had no occasion to do such a thing. The interest was figured at 7 per cent. from the date of the loan to the 1st of April, and paid.

Int. 30. Do you know of any time during the existence of the Hayward loans in question, that any balance, or a sum of about sixty dollars, was figured up and given to M'r Demeritt to see M'r Hayward about, except the instance which you have stated as occurring after Sept. 8, '68?

(Objected to.)

Ans. Not to my recollection.

207 Int. 31. Had M'r Hayward, between April 1, '67, and Sept. 8, '68, paid any interest, or interest at any rate, on the loans in question here in which the stock was pledged?

(Objected to.)

Ans. M'r Hayward had not paid the interest on the loan mentioned between April 1, '67, and Sept. 8, '68.

Int. 32. Had he paid any portion of it?

(Objected to.)

Ans. No, sir; unless you construe the balance of the governments to have been a partial payment.

Int. 33. Will you give the entry on your book of the loan to M'r Hayward, for which the government bonds were held at the time of the sale of the bonds, and how it stood and was left upon the sale being made, and how the surplus appears?

(Objected to.)

Ans. The date of the loans on the bonds I can't give without reference to letters. The sale was effected the 3d of September, and the surplus above, principal and interest, $375.03, was credited to interest account C. L. H., indicating C. L. Hayward, in Bank Balances 1.

Int. 34. What was the amount of that loan for which the said bonds were held at the time of the sale of the bonds, and which was paid by the sale of the bonds as it stood the day of sale?

(Objected to.)

Ans. 4,000 or 4,500; I won't state explicitly, but will give the information upon reference.

Int. 35. What was the interest due on the two loans for which the Hecla stock was pledged, from the 1st of April, 1867, up to which time, as you say, the interest was paid in full, to the day when the bonds were sold and the surplus realized?

(Objected to.)

Ans. I shall have to enter into a calculation. Hastily calculated, I make it $783.22.

Int. 36. Will you look at your books and state when the loan, for which the bonds were pledged as collateral, was originally made; what kind of a loan it was, whether a time loan or a temporary loan, and state what it was, and to what time it run.

(Objected to.)

208 Ans. I will, and fix the date; the balance of the question I can answer now.

Int. 37. Answer the balance, then, and answer the rest when you have looked.

(Objected to.)

Ans. The loan was a demand or call loan, with government bonds as collateral.

Int. 38. To what time did it run, and when end?

(Objected to.)

Ans. It was closed and paid on the 3d of September, 1867.

Int. 39. At what rate of interest?

(Objected to.)

Ans. Will answer by reference to entry.

Int. 40. Will you examine Exhibit 21, now shown you, and state whether you were at the bank when that account was made and delivered?

(Objected to.)

Ans. I was not at the bank.

Cross-examination by E. F. Hodges, esq., of counsel for complainant:

Cross-int. 1. In answer to the 2d direct question, you named an amount of money paid by M'r Hayward on the 1st of April 1867. Did M'r Hayward pay that money to you?

Ans. I presume he did; it was credited to that account. I am as sure as that any of the interest accounts were paid to me that he paid his.

Cross-int. 2. Have you now any recollection whatever of the fact of his paying you that money?

Ans. I shouldn't undertake to particularize the money that he handed me; do not recollect of any of the particular instances in the payment of all the loans, only that they were paid and credited, and I had no question by the parties who owed them. What I mean is, that I could not recollect whether in bills or checks, the particular items of his or any other customer, paid in.

(Answer objected as entirely irresponsive and uncalled for after the words "handed me.")

Cross-int. 3. Will you swear that you remember M'r Hay-
209 ward's paying any money on the 1st of April, 1867, or within three or four days of that day to you, aside from what suggestions you derive from your books? Will you answer this question, yes or no?

Ans. I will answer it according to my own knowledge and conviction.

Cross-int. 4. That is your answer to the question, is it?

Ans. My answer to the condition, not to the question.

Cross-int. 5. Why do you not answer the question?

Ans. For the reason that I think I can't answer it fairly and truthfully in those terms, yes or no.

Cross-int. 6. Will you swear that, aside from your book, you remember that Mr. Hayward paid you any money within four days from the 1st of April, 1867?

Ans. Aside from my record on the book, I will not swear. That is sufficient to satisfy me that the payment was made.

(Answer objected as irresponsive and uncalled for after the words "will not.")

Cross-int. 7. You referred in your direct answer, when speaking of the payment of interest by M'r Hayward about the first of April, 1867, to an entry in your book. In whose handwriting is that entry?

Ans. The bookkeeper in the bank.

Cross-int. 8. In your answers to the direct interrogatories you have

referred to other entries in the books. Were all these entries made by one or another of the bookkeepers in the bank, or were they made by you; and if any of them were made by you, state which of them?

Ans. They were all recorded on the book by the bookkeeper, on Bank Balances 1.

Cross-int. 9. When you have referred to these entries for figures, you have referred to entries made by the bookkeeper of the bank, have you?

Ans. Yes; recorded by the bookkeeper of the bank.

Cross-int. 10. Referring to a supposed surplus derived from the sale of bonds held by the bank for a loan to M'r Hayward, you have spoken of the sum of $375.03 as that surplus. Will you please say whether that sum was, on or about the 3d of Sept., 1867, entered on M'r Hayward's account to his credit?

Ans. No, sir.

210 Cross-int. 11. Did you ever render to M'r Hayward an account of the sale of those bonds?

Ans. I don't think I made an account, but, as in all such cases in the sale of bonds, probably received a statement of the sale from the parties to whom they were sold, which, as in the common way, I would hand him.

Cross-int. 12. Do you mean to be understood that you handed such an account to M'r Hayward?

Ans. I mean it to be understood that I think it more than probable that he received that statement of the parties to whom they were sold.

Cross-int. 13. I ask not what your opinion of the possibilities was, but whether you meant to say that you handed him such an account. Will you say whether you did or did not hand him such an account?

Ans. I can't say that I did or did not.

Cross-int. 14. In answer to the 11th direct question, you say, referring to this surplus, it was not credited by entry on the books to C. L. Hayward, but held "for benefit of—open account, I should think you'd call it—and applied upon the settlement of the loan." How was the surplus applied upon the settlement of the loan, and what loan do you refer to?

Ans. Referring to the loans of Oct. 17, 1866, of 6,500 and 20,000 dollars.

Cross-int. 15. And you now say that that sum was applied in the settlement of those loans, do you?

Ans. In the settlement of those loans and interest; yes, sir.

Cross-int. 16. By whom applied?

Ans. By the bank.

Cross-int. 17. It wasn't included in the paper shown you, Exhibit 21, you have said. That's so, is it?

Ans. Yes, it was not included in that.

Cross-int. 18. Prior to Sept. 8, 1868, you never entered it to M'r Hayward's credit on account of that loan or interest, did you?

Ans. Entered it to the credit of interest identified, C. L. H.

Cross-int. 19. (Question repeated.)

Ans. It was entered to the credit of interest identified, C. L. H., but not to the credit of M'r Hayward's private account. It was under-

211 stood that it was to be so applied, according to his written order to sell and hold the balance to the credit of his account.

Cross-int. 20. The written order mentioned in the order of Sept. 3, 1867, which you have heretofore produced here, and a copy of it is in this case as an exhibit, is it not?

Ans. Yes, sir.

Cross-int. 21. When you say "understood," in your answer to the question next before the last, who do you mean understood it?

Ans. I mean M'r Demeritt and myself.

Cross-int. 22. From September, 1867, to September, 1868, when M'r Hayward was being pressed for money upon the loan to the bank, did you ever mention to him that there was the surplus of $375.03 to his credit?

Ans. I wouldn't say whether I did or did not, feeling in my own mind that he was well aware of it.

Cross-int. 23. In answer to the direct question, you have said that on your return to the bank from your absence, about the 8th of September, you discovered that M'r Hayward's account had been cast at 6 per cent. instead of 7, and then you figured the difference between 6 and 7 per cent. Referring to that I ask, did you then make an account upon paper in which the difference between 6 and 7 per cent. appeared, or did you make an account of M'r Hayward's loan on the Hecla stock and the assessments paid thereon, and the interest cast at 7 per cent.?

Ans. I made it both ways, yes, sir; at 6 per cent. and 7 per cent., and put down the difference.

Cross-int. 24. Did you make that account in September, 1868?

Ans. I have no question I did. It was not a regular account; it was on a slip of paper. It was probably done at that time. About that time I think the slips were, and then I think the original slips were among the papers with the figures.

Cross-int. 25. Among what papers?

Ans. Among my memorandums of the account at the bank.

Cross int. 26. Will you swear that you made up such account as you have now been speaking of before the year 1872?

Ans. Yes, sir.

Cross int. 27. You have been examined before upon this sub-
212 ject; did you then say that you presumed the account was among your memoranda at the bank?

Ans. I don't recollect that I was asked that question.

Cross int. 28. When, after the month of Sept., 1867, did you first enter in an account on paper, a slip of paper, if you please, figures showing the interest on M'r Hayward's loan at 7 per cent., and making an account of the surplus of $375.03?

Ans. I can't fix the dates when.

Cross int. 29. Did you ever do it till the year 1872?

Ans. I have no question, sir, I did.

Cross-int. 30. When, if ever?

Ans. I won't undertake to fix a date precisely.

Adjourned.

APRIL 19, 1873.

Cross-int. 31. Will you state how the surplus of $375.03, which you have spoken of, was characterized on the books of the bank? Did it appear in an account called surplus, or what title was it under?

Ans. It appeared under the interest account on Book Bank Balances 1, under date of Sept. 3, 1867, to the credit of interest, characterized Interest, C. L. H., indicating C. L. Hayward, $375.03.

Cross-int. 32. Why was that called interest, it being the surplus derived from the sale of U. S. bonds held by the bank as collateral?

Ans. Because it was considered an account of payment of interest on loans pending, which interest had not been paid.

Cross int. 33. Is that minute or entry to which your attention is now directed upon the book, and to which you have just now alluded and

quoted from, the only place where that item appeared on your book down to the 8th of Sept., 1868?

Ans. I think it is.

Cross-int. 34. In your answer to the direct question, you have spoken of the loan to M'r Hayward, for which the U. S. bonds were pledged as collateral, as being about 4,000 or 4,500 dollars; that sum I would like to have defined. Was it 4,000 or 4,500?

Ans. 4,000 dollars.

Cross-int. 35. And it was to pay that $4,000 that the U. S. bonds
213 were pledged, which bonds, when sold, produced the surplus of $375.03, was it?

Ans. It was to pay that loan of $4,000, and interest on same, being $118.22; leaving, after said payments mentioned, $375.03.

Cross-int. 36. What was the amount of the bonds pledged?

Ans. Probably $4,000.

Cross-int. 37. Don't your books show exactly the amount of bonds pledged?

Ans. No, sir; we made no entries of collaterals usually, further than minutes held with these loans in a wrapper at that time.

Cross int. 38. When the bonds were sold they were sold with the then accumulated interest on them, were they not?

Ans. The bonds were sold flat. It is the custom universally to sell bonds with the accumulated interest, the market value being affected by the amount of accrued interest, more or less.

Cross-int. 39. On temporary loans such as these we have been speaking of how often was it the custom of the bank to collect or demand interest?

Ans. Not absolutely, but generally once in six months, the semi-annual date being just previous in the payment of dividends. The 1st of April and October were our days of dividends.

Cross-int. 40. Reverting now to the entry in your books quoted from yesterday, where the item $837.66 is entered as of the 27th of March, 1867, if that money was not paid until the 1st of April, how should it be entered as paid on the 27th of March?

Ans. It was my custom to figure all the interest on the temporary loans a few days in advance of the dividend days in order to give the directors a clear statement of the bank's condition of earnings up to the 1st of April in this instance, to which date this and the other interest was figured.

Cross-int. 41. That doesn't answer the inquiry, which is, how it should be entered as paid then, not as figured up then, if it was not paid until the 1st of April?

Ans. It is my custom in figuring these loans to make a slip of each man's interest indebtedness and pass the same to the teller for credit a few days before the first of April.

214 Cross-int. 42. The entry, then, that you have referred to would indicate that you had cast that much interest was due from M'r Hayward, and would not announce or express that it was paid, would it?

Ans. It would announce that it was paid, but not necessarily on the day of the entry.

Cross-int. 43. It was put on the list with M'r Hayward's name, and that item of interest was put on the list before it was paid, was it?

Ans. That and many other items of interest on all our temporary loans were figured before they were paid.

Cross-int. 44. The interest on all loans temporary were than figured

and the list handed to an employé of the bank to receive the mony before the dividend day; is that so?

Ans. As a rule, yes, sir.

Cross-int. 45. Did you enter on the list from which you read that entry yesterday the initials or the names of the debtors in these temporary loans?

Ans. Each item of interest credit on his temporary loan is initialized with the initials of the man who should pay.

Cross-int. 46. The initials C. L. H. opposite the items making up 837.66, indicate that that was the amount of interest due from M'r Hayward on temporary loans on the 1st of April, '67, does it?

Ans. Indicates the amount of interest due on temporary loans, $6,500 and $20,000 to that date.

Cross-int. 47. What is there in that item that indicates that it is interest on those two sums?

Ans. The amount of the items being the interest on those two loans from the dates to April 1, '67.

Cross-int. 48. Nothing else to indicate it in the item is there?

Ans. No memorandum further than I have stated.

Cross-int. 49. Is there anything in the item to indicate it beyond what you have stated?

Ans. Nothing further than the amount.

Cross-int. 50. If on the 27th of March, M'r Hayward had been indebted to the bank on any temporary loan other tha then $20,000 and the $6,500 above named, and upon which loan interest would become due on the 1st of April, 1867, would not that interest be entered and included in this item of $837.66?

Ans. Not necessarily.

215 Cross-int. 51. If that interest last inquired of had been paid by M'r Hayward on the 1st of April, '67, would it not have appeared in this entry?

Ans. It naturally would.

Cross-int. 52. When was the loan of $4,000, for which the said government bonds were pledged, made to M'r Hayward?

Ans. I can't fix definitely in my mind the date of that loan. I have brought the books covering a long term of business, and many transactions with M'r Hayward in temporary loans, and they are subject to inspection.

Cross-int. 53. Have you brought with you the book that will show the payment of interest on temporary loans preparatory to the October dividend, 1866, corresponding to the entry preparatory to the April dividend, wherein you find the item $837.66?

Ans. I have the book here.

Cross-int. 54. Will you now look at your temporary loan account for the latter part of August, '66, and the 1st of September, '66, and see if you do not find the loan of $4,000 made to M'r Hayward, and for which he pledged the government bonds?

(Witness looks at book and says:)

Ans. I see a credit of $4,000, Aug. 29, 1866, in his account; whether it is the identical loan referred to I shouldn't want to swear. It may or may not be.

Cross-int. 55. Do you find any other loan of $4,000 to him on your books for which you have any reason to suppose he pledged the government bonds subsequent to that date?

(Witness look' at books and answers:)

Ans. There is an entry for $4,000 on the 10th of Oct., 1866.

Cross-int. 56. How far down have you looked?

Ans. March 17, 1867, that being the latest book I have with me.

Cross-int. 57. Will you examine your books and report whether the two items of $4,000 named in your last answer were loans made by the bank to M'r Hayward, and whether they were paid, and if paid, when?

Ans. I will examine and try to establish whether they were loans or deposits, and if loans and paid, when.

216 Cross-int. 58. Will you also see and report, if you can, whether the said government bonds were pledged as collateral for either, and which of the said sums of $4,000?

Ans. I will try and establish that.

APRIL 21, 1873.

Cross-int. 59. Can you now say when the loan was made to M'r Hayward by the bank upon which the government bonds were pledged as collateral security?

Ans. I cannot state to a certainty.

Cross-int. 60. When do you think it was?

Ans. I am unable to state, as it may have been made and embodied in other loans in connection with the collaterals. This is the reason I cannot state for a certainty or give an opinion. One thing I do know in regard to it, the $4,000 loan was paid Sept. 3, 1867, and that it was in the bank's temporary loan the preceding April.

Cross-int. 61. The $4,000 loan you refer to was the one upon which the governments were pledged, is it?

Ans. The $4,000 loan is the loan which the governments, when sold, paid on the 3d of Sept., 1867.

Cross-int. 62. If you can ascertain from your books that much about the $4,000, why can you not ascertain when it was made?

Ans. For the reason that it may have been held in the bank as a cash item, and for the reason that it may have been in the temporary loans, possibly with another loan in one item, and perhaps I haven't investigated sufficiently to satisfy myself and to be able to testify to a certainty as to its date. I have found two loans or credits of $4,000 each, which are not initialized and marked to enable me conscientiously to swear which, if either, was the loan referred to. There may be other $4,000 loans, or loans embodying other amounts in connection with it that would tend to cover and make it difficult to establish the identity of the particular loan.

Cross-int. 63. When were the two $4,000 loans referred to in your last answer made?

Ans. The two last $4,000 loans or deposits not clearly defined were dated as follows: Oct. 10, '66, $4,000 appeared to the credit of C. L. Hayward, and Aug. 29, '66, there was a credit to C. L. Hayward of $4,000, whether a loan or deposit I am not certain, not being initialized. There are other credits of loans of larger and smaller sums.

217 Cross-int. 64. In answer to direct question 8, referring to the date of the loan for which the government bonds were pledged, you answered substantially that you couldn't state when it was made without reference to your books, and added these words, "though I can state explicitly upon reference to entries." What did you then refer to if you are not able to state now when that loan was made?

Ans. I presumed then that the entries were made separately, not thinking of the liability to compounding items.

Cross-int. 65. Can you not ascertain when that loan was made from your books?

Ans. I have made efforts and investigated and tried hard to some

extent to satisfy myself clearly as to that loan to date, and thus far I am not quite clear. The difficulty is the double transactions and magnitudes and liability to be other items compounded with it, though I have been able to find the two $4,000 entries mentioned.

Cross-int. 66. In March, 1867, you made out or had made out a list on which were entered the names of parties indebted for interest on temporary loans; where is that list? I ask where the original is?

Ans. That is more than I can tell; it was considered as waste paper in the bank and probably sold for old paper; I have, instead of one, two books representing these entries, one that of the bookkeeper, and the other that of the teller, which I now hold in my hand.

Cross-int. 67. Do these books purport to contain an exact copy of the list handed to the teller?

Ans. They contain the substance of the list, the figures, and for whose account.

Cross-int. 68. The entry of $837.66, purporting to be the amount paid by Mr. Hayward as interest on the temporary loans to the 1st of April, 1867, appears on your book to be in two items, does it not? Please name them.

Ans. It does; $800 by itself; then $37.66 by itself in brackets, one directly under the other, as per entry on receiving-teller's book.

Cross-int. 69. The entries of $837.66 appear in the same way on both the books you have named, and are the only ones in which that interest appears in the bank-books?

Ans. I think so.

Cross-int. 70. I understand you to say that the item $375.03
218 was entered to interest; why was it not entered on the account, "Exhibit 21," that has been shown you here?

Ans. Because the account was rendered in my absence, and those matters were not left in the hands of the bookkeeper or teller.

Cross-int. 71. Then it was not included on Mr. Hayward's memorandum, was it?

Ans. I am not quite clear, but my impression is that a minute was made of the amount on the memorandum.

Cross-int. 72. Do you mean to swear at this time that you believe that before the 8th of Sept., 1868, that surplus of $375.03 was indorsed upon Mr. Hayward's memorandum given to the bank for the Hecla loan?

Ans. I do, sir. I do think so.

Cross-int. 73. By whom was it indorsed, if by any one?

Ans. It was my business to do it, and probably I did it. I can tell better by reference to the indorsement, if there is one.

Cross-int. 74. Was there anything in the bank from which the account called Exhibit 6, or rather the account of which Exhibit 6 is a copy, was made except the notes?

Ans. Yes, sir.

Cross-int. 75. What is it?

Ans. The notes, the assessment receipts, and the interest thereon, constituting the facts of the account.

Cross-int. 76. The notes were necessary to be before the accountant who made up that account, were they not?

Ans. Not necessarily; the facts were all recorded on the books of the bank.

Cross-int. 77. In making up that account, then, the accountant would look somewhere else than to those notes for the items expressed in those notes, would he?

Ans. He wouldn't be confined to those notes or to the record. He would refer to either, and in my absence I don't know which he referred to. The paying-teller made the account.

Cross-int. 78. Is there any one account in the bank that would show those notes with any indorsements that might be on them as clearly as would appear from the notes themselves?

Ans. I should say not, sir, at a glance, without examination.

219 Cross-int. 79. Is there any one account in the bank that would show that $375.03 had been indorsed upon either of those memorandums prior to Sept. 8, 1868?

Ans. There are accounts in the bank that would show that amount was paid in the interest account, and for what account it was received. And such entry does appear—Sept. 3, 1867. The accounts would establish the payment.

Cross-int. 80. (Question repeated.)

Ans. The accounts in the bank would not show indorsement, but would show payment.

Cross-int. 81. Will you produce and read to the examiner, that he may take a copy, the entry referred to in your answer to the 79th cross-interrogatory?

Ans. Bank balance, 1. Interest account, credit, Sept. 3, 1867, int. indicating interest, C. L. H., indicating C. L. Hayward, $375.03. Same date, same book, same account, interest on U. S. bonds sold on account C. L. H., indicating C. L. Hayward, $118.22.

Cross-int. 82. The items quoted in the above answer appear on that book among various other items entered in those columns and in various lines making your accounts with sundry banks, your accounts of dividends, profit and loss, taxes, etc., etc., and the initials C. L. H. are the only things that indicate that M'r Hayward has anything to do with that account or upon that folio?

Ans. No, sir.

Cross-int. 83. What else is there that indicates he has? Quote it.

Ans. The records of the receiving-teller therefor were presented under date of Sept. 3, the following of which is an exact copy: Credit, temp. loan, indicating temporary loan, C. L. H., indicating C. L. Hayward, $4,000. Immediately under on the following line, interest loan, C. L. H., $118.22. Immediately between that in the handwriting of the teller are these words, made on that day's balance sale of bonds, C. L. H., indicating C. L. Hayward, account interest due T. L., indicating temporary loan, $375.03.

Cross-int. 84. Is the entry last quoted, together with the one previously quoted, the only entries indicating that C. L. Hayward had anything to do with that $375.03?

Ans. No, sir.

220 Cross-int. 85. When was the entry last quoted written at the point where it is found?

Ans. It was written at the time of the date mentioned, to which the parties who wrote it will probably swear. Two parties made entries in the books, one of them under that entry, and many others made entries on the book. Being a busy day the receiving-teller requires a little assistance, which is quite common. You'll notice it all through the book.

Cross-int. 86. You have said that those two items are not all the places where M'r Hayward is associated with that item; will you produce another?

Ans. I might say his whole indebtedness would bear upon this item,

It would be connected. I don't know that that is what you mean in your question.

Cross-int. 87. You have said heretofore that that item was not entered in M'r Hayward's private account; how then could it appear in the account of M'r Hayward's indebtedness?

Ans. It would appear in my temporary-loan minutes—my own records of the condition of the account.

Cross-int. 88. Will you produce those records that we may see them?

Ans. I have already furnished copies, which you have.

Cross-int. 89. When were those records made that you refer to in your last answer?

Ans. I can't establish a date. I have made them and copies of them, but as to date I can't say certain.

Cross-int. 90. Were they records made of your daily or weekly transactions in the bank, and was that item made on the 3d of Sept., 1867, or do you refer to an aggregated statement that has been made up since the examination of witnesses in the case produced by you and called Exhibit No. 10?

Ans. I have no question that $375.03 was entered at the time that transaction was made. I see no reason why it shouldn't have been.

Cross-int. 91. Was the paper Exhibit No. 10 made Sept. 3, 1867?

Ans. I don't think it was, sir.

Cross-int. 92. When you made the answer next before the last you held Exhibit No. 10 in your hand, did you not?

221 Ans. I am willing to answer yes or no, but I don't know whether I held the paper in my hand at the moment that question was asked or not. It might have been the one before or the one after it. I didn't refer to that paper when I was answering, but to my temporary loan minutes of this transaction; that was what I understood you to refer to.

Cross-int. 93. Assuming that your temporary loan minutes and your "records of the condition of the account," named in your answer to the 87 cross-int., to be one and the same thing, will you produce those temporary loan minutes or those records, that we may see them?

Ans. I will produce some original temporary loan minutes, as many as I have not yet introduced, after going to the bank, which may apply to this question.

Cross-int. 94. I ask again are those temporary loan minutes kept upon a book in the bank, or in what shape are they?

Ans. In part on books of the bank, in part in the shape of minutes or memoranda, as I have before stated.

Cross-int. 95. On what books of the bank?

Ans. Such books and the books as I have presented to-day, as per your call.

Cross-int. 96. Any other books than those you have produced to-day?

Ans. I think not.

Cross-int. 97. Then your own records and temporary loan minutes are memoranda on separate pieces of paper, as distinguished from the books you have presented, are they?

Ans. They are on separate pieces of paper, which may represent the same facts that the books do, possibly more fully in detail, being minutes.

Cross-int. 98. Made at the date of the transaction represented in them, or at some other date?

Ans. I speak of them as original papers made at the date of transactions, so far as they go.

Cross-int. 99. Then, in making up Exhibit 6, the party who made it

could have turned over the books you have presented, and found, if he had looked long enough and diligently enough, the entries you have named; but would he not have been compelled to look at random or to have ascertained the date of the said transactions and entries in
222 order to ascertain M'r Hayward's connection with a right to the $375.03, would he?

Ans. That is a pretty long question. I don't know as I got the drift of it.

Cross-int. 100. (Question repeated.)

Ans. He would have had to refer to my temporary loan minutes, the notes or book accounts. He is best competent to tell what he referred to, as I was absent.

Cross-int. 101. The book-accounts referred to in your last answer are the books which you have just produced here, and had copied, are they?

Ans. Yes, sir.

Cross-int. 102. In your absence on the 8th of September, '68, would the teller or the person who made up Exhibit 6 have access to your temporary loan minutes?

Ans. Yes, sir. Nothing belonging to the bank is locked up in my absence, except out of hours.

Cross-int. 103. He would have had access to the notes, then, would he?

Ans. He would, subject to the president's direction, as all matters in the absence of the cashier are under the immediate supervision of the president.

Cross-int. 104. Would not his access to your temporary loan minutes have been subject to the immediate supervision of the president?

Ans. I should think most likely the president was a party to all the business, that with the rest, in the absence of the cashier.

Cross-int. 105. Access to the notes was no different than access to your temporary loan minutes, was it, so far as the president was concerned? They were both alike under his control in your absence, were they?

Ans. Yes, sir; all under his control, management, and direction.

Cross-int. 106. Will you now cast the interest on $6,500 from the 17th of October, 1866, to the 1st of April, 1867; and on $20,000 from Oct. 19, 1866, to April 1, 1867, at 6 per cent. and at 7 per cent., and state the cast, that the examiner can put it down, so that we can see the exact data of your calculation?

223 Ans. The interest on the loans at 6 per cent. is $717.66, and at 7 per cent. it is $837.27.

Cross-int. 107. In whose custody were the certificates of stock and the notes of M'r Hayward down to the time of your leaving the bank on the occasion of your absence about the 8th of September, 1868?

Ans. They were in the vault of the bank, and I think among the temporary loan papers. They probably were.

Cross-int. 108. Were they and other bank securities in your custody as cashier, in custody of the teller, or of the messenger, or of the porter of the bank?

Ans. They were in my custody as cashier. The president had access to them, and the cash-teller locks up the valuables of the bank, the money-vault, and sometimes I do it myself; but, as a rule, I hold the temporary loan papers, and the discount-clerk the notes. No one officer has absolute control of all the money and valuables in the bank.

Cross-int. 109. Can you now tell when you last saw the notes or mem-

orandums given by M'r Hayward for the loans we call the Hecla loans? I ask simply for the time when you last saw them, and nothing more.

Ans. I can't fix a date when I last saw them. I have tried to fix it in my own mind. I've seen them so many times that I don't think I can tell. It makes it difficult.

Direct examination resumed:

Int. 41. Had the loan accounts for which government bonds were held any connection or association with the Hecla loans, so called?

Ans. A portion of the same was applied to the payment of the said loan, but a loan of $4,000, for which government bonds were sold to pay, was paid on the third day of September, 1867. So much of the excess above the interest and principal of the same was applied to the Hecla loans.

Int. 42. Can you find on your books any traces that the $4,000 loan was paid Sept. 3, 1867, and existed prior to the first of April, 1867?

Ans. I cannot.

Int. 43. Will you copy from the books referred to the list of interest cast on temporary loans, in which you find, as you say, the interest
224 on the Hecla loan so called up to April, 1867, making an exact transcript of your book in that respect to that extent?

Ans. I will cause it to be copied and furnish it, the whole page, as requested.

Int. 44. Will you tell, if you can, how the items of interest, $837.66, were paid?

Ans. These items of temporary loan interest, Hayward's among the rest, were figured and passed to the receiving teller, credited in interest account on March the 27th; of this amount $800 was paid on that day, and $37.66, the odd amount of the ticket contained in the cash as a cash item until the 3d of May, at which time coupons of the bonds were sold; the entry showing the same reads as follows: This entry is referred to in the first instance now. The following is a copy, receiving teller's book, commenced March 18, 1867, finished May 16, 1867, as follows: Balance after sale of coupons, $40.80; deduct interest, $37.66; credit C. L. Hayward balance, $3.14.

Int. 45. Will you tell how or from what time the interest on the $4,000 government loan was cast and paid on Sept. 3, 1867?

Ans. It was figured from the 1st of April, '67, at 7 per cent., amounting to $118.22, the money coming from the proceeds of the sale of the bonds, and the item $118.22 credited to interest account C. L. H.

Int. 46. Will you state as near as you can when, with reference to your return to the bank after Sept. 8, 1868, you ascertained the error and figured the balance of $62.52 due the bank from M'r Hayward, of which you have before spoken, and arising from the correction of the error spoken of?

Ans. I can't fix a precise date; it was about the time; soon after, I should say.

Int. 47. State as near as you can with reference to the same time, that is the time of your return, when you had the interview with M'r Hayward, of which you have spoken in your testimony when examined by the complainant, wherein he stated about being glad he was taken from under the harrow.

Ans. Within three weeks of the sale, perhaps two; it was about that time.

Int. 48. Will you state just what that interview was, as accurately as you can?

225 Ans. M'r Hayward came into the bank, then at 13 Kilby street, and came up to my desk and expressed himself, referring to the account, as highly gratified at being relieved from under the harrow. The conversation seemed to be, as I recollect it, of a congratulatory character; he seemed pleased.

Int. 49. Of what matter were you speaking, and to what alluded at that time?

Ans. To the settlement of the Hecla loan.

Int. 50. Will you state whether you have made search for the original memoranda or memorandum checks given by M'r Hayward for the Hecla loan, and, if so, whether you have been able to find them?

Ans. I have looked these papers over in my custody, and searched for these original notes, and am unable to find them.

Int. 51. State whether, after this bill was brought, you made and gave me copies of them?

Ans. I did make copies of them. I don't know when.

Int. 52. Did you give or send those copies to me?

Ans. I think I sent them, but am not certain.

Int. 53. Will you look at the paper now produced and shown you, marked "Exhibit 26," and state whether this is or is not one of the copies referred to, and in whose handwriting it is?

(Objected to as out of time, as introducing papers in no way referred to in cross-examination, and because it introduces a copy, the loss of the original not being proved.)

Ans. It is a copy of one of the original notes in the handwriting of our discount clerk and notary public, M'r Adams.

Int. 54. Will you look at the paper now produced and shown you, marked "Exhibit 27," and state whether that is or is not a copy of the other of said checks or notes given in the Hecla loan with the indorsement thereon, and in whose handwriting that is?

(Same objection.)

Ans. It is a copy of the original and in the handwriting of the same party, M'r Adams's, as the other exhibit.

Int. 55. Will you look at the indorsement on the two papers last named and produced, and state what those are a copy of, if anything?

Ans. They are a copy of the indorsements made on the original notes given for the Hecla loan.

226 Int. 56. Have you, since your previous examination, looked for and found any other paper signed Charles L. Hayward? If so, will you produce the same?

(Same objection.)

Ans. I have, sir; and now produce it. (Produced and marked "Exhibit 28, E. T. N., Examiner.")

Int. 57. Where did you find such paper, who signed and gave it to the bank, and where has it been since?

Ans. I found it in the bank's safe among its papers. Charles L. Hayward signed it, and it has been in the custody of the bank ever since.

Int. 58–9. If M'r Demeritt, the president, after you found the error before spoken of, arising out of casting the interest at 6 instead of 7 per cent., and not crediting the said surplus arising from the sale of the government bonds, and you gave to M'r Demeritt a paper showing a balance of $62.52 due, M'r Demeritt made any report to you as to what M'r Hayward said about it or paying it, state when he made the report, if at all.

Ans. He said he had seen M'r Hayward. I can't fix a date. It was

about that time; perhaps it was within a week, and perhaps it was within a month: I can't say.

Int. 60. Was that report made after or before the 8th of Sept., '68, or the time when you returned to the bank, as you have before stated?

Ans. After Sept. of '68.

Int. 61. How long after, as near as you can fix it?

Ans. Well, within two or three weeks.

Int. 62. After that suit was brought, and before the answer was sworn to by you and filed in this case, did you or not give me a paper showing how that balance arose and what the error was in the account as made up and given to Hayward, Sept. 8, '68?

Ans. I gave you a copy of the account.

Int. 63. Will you look at the paper now produced, marked "Exhibit 29," and see whether that is or is not the paper referred to which you gave me?

(Same objection.)

Ans. Yes, sir: it is.

227 Int. 64. Do you recollect whether in speaking with M'r Demeritt or in connection with the defence in the suit, in filing the answer or drawing the same, you did or did not show him that paper or the original of it?

Ans. I did, sir.

Int. 65. Will you state whether or not, at the time you discovered and determined the error and the result of it before alluded to, you gave him the paper or slip like that showing the figures?

Ans. I made a statement, and he and I looked it over together. I showed it to him.

Int. 66. State whether he did or did not keep it and take it away with him at that time; if so, for what purpose if you know?

Ans. It was taken to confer with M'r Hayward in regard to the payment of that interest.

Int. 67. If, at any time after that, he made any report of any interview with M'r Hayward in relation to it, state what that report was.

Ans. That he had had an interview with M'r Hayward, and it was understood and agreed between him and M'r Hayward that he would pay that difference if he was ever able. These are the words of the president in his report as made.

Int. 68. Will you state whether or not the memorandum-checks of M'r Hayward referred to were at that or any time afterwards given to or taken by the president to be delivered to M'r Hayward on his paying the balance found to be due, as you have stated?

Ans. They were delivered to M'r Demeritt to be settled, but what day or date, whether at that date, I cannot say.

Int. 69. Were the said memorandum-notes, to your knowledge, retained by the bank after the sale and delivery of the stock to the purchasers named any view of the bank's ever taking the stock back and holding the notes afterwards against M'r Hayward for the amount thereof? State how this fact was.

Ans. Not to my knowledge. Never heard of anything of the kind before.

Int. 70. Did you as cashier, or any other officer of the bank to your knowledge, ever hold or claim any rights to hold said memorandum notes or checks after the sale and delivery of the stock any further than to have the said balance of $62.52 paid?

Ans. No, sir.

(Adjourned.)

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Int. 71. Will you state who gave the original of the notes, of which Exhibits 26 and 27 are copies made by Adams, to M'r Adams to have the copies made?

Ans. I gave them to him and requested him to make copies of the same.

Int. 72. If anything was done by you after the notes were copied to see whether they had been correctly copied, state what you did.

Ans. The copies were compared with the originals and found to be correct.

Int. 73. By whom compared?

Ans. By M'r Adams and myself, together.

Int. 74. By whom were the originals signed, or in whose handwriting were the signatures?

Ans. The originals were filed and signed by Charles L. Hayward on blanks precisely like those in printing. I was particular to get blanks precisely like them.

Int. 75. State whether the originals were or were not the memorandum-notes given by M'r Hayward originally for the Hecla loan, so called.

Ans. They were the same.

Int. 76. In whose handwriting on the original $6,500 memorandum were the words in indorsement on the back of the note, "Int. paid to April 1, 1867," written on the original, and who wrote them?

Ans. I wrote them. I made the indorsement.

Int. 77. In Exhibit 27, who wrote the indorsement of "Int. paid to April 1, 1867," and of balance from sale of bonds, $375.03, Sept. 3, 1867, that is on the original of which the exhibit named is a copy?

Ans. I did, sir.

Int. 78. When were the indorsements on the originals, Exhibits 26 and 27, written; that is, the indorsements named in the two last questions?

Ans. The indorsements Int. paid to April 1, 1867, were made on that day or within two days previous, perhaps. The indorsement following on the $20,000, which is "Bal. sale of bonds, three hundred seventy-five acc. int. on the within 375.03, Sept. 3, '67," was
229 within, $375.03, Sept. 3, 1867," was made on that day, the day of the sale of the bonds. That question refers to the originals, of course.

Int. 79. How happened the interest to be indorsed as paid to April 1, 1867, if $37.66 was paid subsequently by a coupon in May, as you have stated?

Ans. For the reason that the tickets were made charging the several loan accounts with their interest to that date, and it was my custom in passing them up to the teller's cash to indorse on the several loans the payment of the same at the time the tickets went out of my hands, thereby justifying the charge.

Int. 80. Do you know, and will you state, when the coupon which paid the $37.66 was payable, and when collected?

Ans. The coupon was probably taken from the bonds, the semi-annual interest of which matured May and November 1st.

Int 81. Do you remember, so that you can now state, whether that coupon was or was not cut off and applied, in anticipation of its payment, on or about April 1st, 1867?

Ans. I am not clear that the coupon was cut off April 1st, 1867, but

unquestionably had it in mind with the view to the payment of this cash item.

Int. 82. Will you state whether you have examined further; and, if so, whether you can find that the $4,000 item, for which the bonds were held as collateral, existed or stood in the demand loan against M'r Hayward before, on, or about April 1st, 1866?

Ans. I have further examined, and have spent many hours in examining, and am unable to establish in my own mind that that loan did exist previous to the 1st of April mentioned.

Int. 83. Have you found an original slip relating to the loan on account of Hayward just prior to that date, and since the first of October, 1866? If you have, produce the same, and have it annexed as Exhibit 30.

(Produced and marked "Exhibit 30, E. T. N., Examiner.")

Ans. I have, and now produce it.

Int. 84. Will you refer to the receipts for assessments on the Hecla loan, and state when the first assessment was paid by the bank on the Hecla stock?

Ans. The first assessment was paid July 23, 1867.

230 Int. 85. The slip Exhibit 30, which you have produced, begins with what, and when?

Ans. Begins with a loan to C. L. Hayward, $3,000; 50 shares O. & L. C. R. R., signifying Ogdensburg & Lake Champlain Railroad, $3,200; Sept. 24, 1866, 100 water-power; footed, making $6,200.

Int. 86. When and where did you find this slip last referred to?

Ans. Among the loose papers in the bank. Well, I've always had it. Where I first run across it I couldn't state exactly.

Int. 87. Did you have it yesterday when you were being examined?

Ans. Yes, sir.

Int. 88. Where was it?

Ans. In a package of papers in the bottom of my trunk.

Int. 89. When did you look it up and find it?

Ans. I cannot state.

Int. 90. Will you look on the Exhibit 30 and see whether the Hecla loans, so-called, appear there? If so, state when and where.

Ans. They do appear here. Immediately after the figures 7,700 in the column comes the figures 6,500, dated October 17, 100 Hecla; following that, $20,000, October 19, 350 Hecla.

Int. 91. At the time when the loan of $6,500 was made, October 17, what was the amount due in this loan by M'r Hayward to the bank?

Ans. $7,700.

Int. 92. Will you begin from them and state how the account was down to Nov. 30, '66, and how it then stood, and what the sum then due the bank was, and consisted of?

Ans. Immediately following the $7,700 is entered $6,500, October 17, 100 Hecla, footed, amounting to $14,200. Immediately following the footing $20,000, October 19, 350 Hecla——

(Counsel for defendant requests the witness not to read from it, and to state how the fact was, referring to it to refresh his recollection.)

—— $3,200 water-power loan was paid, and interest; $4,500 loan was paid November 6; $2,000 was added November 6; $1,000 paid November 16, and $1,000 November 30, leaving his indebtedness $26,500, which consisted of his two loans in the Hecla matter.

Int. 93. Then, on that memorandum, what is the $2,250 assessment on 450 shares Hecla, and when was it paid?

231 Ans. July 23, '67, and was the first assessment on the Hecla stock paid by the bank.

Int. 94. And what is the next sum added below, to wit, $1,379.03; and what was that paid for?

Ans. The next sum was an assessment also; the second assessment paid by the bank.

Int. 95. Then, refreshing your memory by the memorandum last produced, will you state whether any of the interest on the Hecla loans, so-called, had been paid up to March 27, or April 1, 1867?

Ans. They had not previous to March 27.

Int. 96. State whether the other demand-loans appearing on that memorandum had or had not been paid, with interest, before Nov. 30, 1866.

Ans. They had.

Int. 97. Whether from that time to April 1, 1867, any of the other loans named on that slip last produced existed unpaid, principal or interest, between Nov. 30, 1866, and April 1, 1867?

Ans. No, sir.

Int. 98. Will you state what search, if any, you have made, and had made, for the original memorandum-notes given by M'r Hayward for the Hecla loan, so-called, of which previous mention has been made?

Ans. I have spent a great deal of time previous to to-day earnestly trying to find them, and a good portion of this day in business-hours has been spent in the same search. I have been to the house occupied by us at about the time of the fire: been all through the inside or money safe and inner apartments of the same safe, and in the outer safe, to see if by chance they were left there, examining the apartment used by M'r Demeritt for papers in his custody, and have also examined the safe thoroughly in the room which we now occupy, and have been unable to find the original memoranda mentioned. I do know that I gave them to M'r Demeritt, since which time I have not seen them; nor do I know where they are. They may have been lost in moving on the night of the fire; but of this of course I am not certain.

Int. 99. Will you please state whether you have looked and searched, and what search you have made, for the original slip on which you figured the balance due from M'r Hayward, after your return to
232 the bank, after Sept. 8, 1868? If you have found it, produce it; if not, state the result of your search.

Ans. I have searched diligently for the paper referred to, and as yet am unable to find it, and it occurs to me that I may have handed to M'r Demeritt the original paper instead of a copy; or it may have been lost among the waste-papers of the bank.

Int. 100. Has anything occurred in the bank since to disturb or disarrange such papers, or to give occasion for loss; if so, what is it?

Ans. The excitement and confusion attending a hurried moving at midnight, on the night of the great fire of November last, having at that time moved the effects and papers of the bank, in part, out on Commonwealth avenue, in an open express-wagon, the same remaining there from Saturday night until Monday morning, at which time the effects were returned to the room now occupied by the bank. I had seven or eight parties to assist me in moving. I will here state I was under some mental excitement at that time, laboring from eleven to half-past twelve before I succeeded in opening the money-vault, and not having the directors to counsel as to what was best to do.

Int. 101. Did the bank return to the same quarters that they occupied prior to the fire; or where did they go?

Ans. They did not. They went to the opposite corner, No. 17 State street.

Int. 102. Will you state whether, when you sent me the paper, Exhibit 29, you had the original slip from which that was made at that time, or how that was?

Ans. This was undoubtedly made from the original, but is a copy of the original. There may have been more than one copy; probably was three or four. As to whether the original was in my hand at the time of making that copy I cannot state.

Int. 103. Have you found any slip showing the transaction of Sept. 3, 1867?

Ans. I've found an original slip having figures upon it referring to that transaction.

Int. 104. Will you produce it, and state what you find to be the fact, if there is anything to be added to what you have already stated?

Ans. This ticket has upon it C. L. Hayward, with figures of the estimate of the sale of the Hecla loan, interest account to Oct. 1,
233 1867, at 7 per cent., amounting to $1,008.61, less paid $375.03; and is dated Oct. 1, 1867, and was made on that day, or within a day or two previous. I now produce it.

(Produced and marked "Exhibit 31, E. T. N., Examiner.")

Int. 105. What is the item on that paper last produced, "less paid $375.03"?

Ans. It is the amount of the excess of the amount of the proceeds of the sale of the government bonds above the interest and principal on the same.

Int. 106. Is the paper last produced an original or a copy?

Ans. It is an original paper, made at its date.

Int. 107. What are the sums on that paper last made, to wit, $2,253 and $1,379.03, and what do they refer to?

Ans. They are the first and second assessments paid by the bank on the Hecla loans.

Int. 108. Then the paper was the computation of the interest due on the Hecla loan and the assessments to Oct. 1, 1867?

Ans. It is the computation of the interest due Oct. 1, 1867, in the estimated earnings of the bank.

Int. 109. At what rate of interest was it cast and from what time?

Ans. At the rate of 7 per cent. interest for the six months previous.

(Counsel for defendant being about to go abroad, it is agreed by counsel that the further cross-examination of this witness may be proceeded with in the absence of counsel for defendant, counsel for defendant to have the right, upon his return, to make any objections to questions or answers which he may desire to.)

(Adjourned.)

MAY 28, 1873.

Present, E. F. Hodges, esq., of counsel for complainant.

Cross-examination resumed:

Cross-int. 110. In you answer to the 6th int., wherein you speak of the entry of $837.66 in bank balances, 1, do you or not mean the entry consisting of two items, one of $800 and the other of $37.66?

Ans. I do.

Cross-int. 111. Are those two sums anywhere in your books entered as one item?

234 Ans. No, sir.

Cross-int. 112. Will you please look at Exhibit 28, and state in whose handwriting the filing of that paper is?

Ans. The filing is in the handwriting of R. L. Day, who was then cashier of the bank.

Cross-int. 113. When did you first see that paper?

Ans. To my clear recollection the first time was when it was presented here.

Cross-int. 114. Please look at Exhibits 26 and 27. You have said you had those exhibits copied. Why did you have those exhibits copied?

Ans. I was requested to have them copied by the president, M'r Demeritt.

Cross-int. 115. When did you have them copied?

Ans. I can't recollect.

Cross-int. 116. Since this suit begun?

Ans. I can't recollect clearly, but think so.

Cross-int. 117. Have you now a distinct recollection of the endorsements that were on the notes when you had them copied?

Ans. I think I have.

Cross-int. 118. In whose handwriting were they?

Ans. In my own.

Cross-int. 119. Will you now swear that you entered on the back of the original of which Exhibit 27 is a copy the $375.03 before the 8th of September, '68?

Ans. Yes, sir.

Cross-int. 120. Can you produce the list of interest dues on temporary loans Oct. 1, '66?

Ans. I can.

Cross-int. 121. Will you produce it?

Ans. I will, sir.

(Witness produces list of interest dues on temporary loans, Oct. 1, '66.)

Cross-int. 122. Please describe this list, that the examiner may take it down.

Ans. Receiving-teller's book No. 10, commencing 18th September, '66, finished Nov. 15, '66, under date Thursday, Sept. 20, '66,
235 among other items of interest, temporary loan, appear the following interest, C. L. H., signifying C. L. Hayward, T. L., signifying temporary loan, Cr. $266.33.

Cross-int. 123. Can you now tell when the Eliot Bank changed its character and became the Eliot National Bank?

Ans. I can, sir; Oct. 20, 1864.

Cross-int. 124. Have you brought your book showing loans made to M'r Hayward, if any, in August or September, '65?

Ans. I have brought the book embracing the bank's business for August, '65.

Cross-int. 125. Please examine and see if the bank made a loan to M'r Hayward of $4,000 between the 20th and 31st of August, '65, on government bonds—five-twenties.

Ans. No such credit appears within those dates on the temporary-loan account.

Cross-int. 126. Did the bank make a loan to M'r Hayward between the 20th and 31st of August, '65, of $4,000 upon a pledge of government bonds?

Ans. None appears on the books and I should say no.

Cross-int. 127. Did the bank make a loan of $4,000 to M'r Hayward in the month of September, 1865, upon a pledge of government bonds?

Ans. There it nothing on the books to indicate it; I should say no.

Cross-int. 128. If M'r Hayward had borrowed money of the bank and pledged government bonds as security in August or September, 1865, would it necessarily appear on the book you have examined?

Ans. If a temporary loan it would, excepting that it might be carried as a cast item, which, however, is hardly probable.

Cross-int. 129. On the 3d of Sept., 1867, you have stated that the bank sold $4,000 of government securities or bonds belonging to M'r Hayward, and pledged to the bank before that time. Can you tell how that sale was made, through whom and to whom?

Ans. Not from recollection, but by labored inquiry I think I can.

Cross-int. 130. Will you ascertain and tell us through whom those bonds were sold and to whom?

Ans. I will try.

236 Cross-int. 131. When government bonds were pledged to the bank, did the bank take the numbers of the bonds or any other description of them?

Ans. Probably not.

Cross-int. 132. Did they never do it?

Ans. I don't think it was the general practice.

Cross int. 133. Have you not upon your books the numbers of the bonds sold by the bank on the 3d of Sept., 1867, and before alluded to?

Ans. Not to my knowledge.

Cross int. 134. In Exhibit 30 there are certain initials, such as O. & L. C. R. R., W. P., etc. Will you take this exhibit and state what those initials refer to, beginning at the top?

Ans. They indicate the nature of the collaterals—"O. & L. C. R. R." signifying Odgensburgh and Lake Champlain Railroad; "W. P." signifying Water Power, Hecla, 350 shares, and Hecla, 100 shares.

Cross-int. 135. Did you ever give the original notes of M'r Hayward to M'r Demeritt more than once?

Ans. I think so, several times, and received them back again.

Cross-int. 136. Please look at Exhibit No. 10, and say if that is a copy from your books, or is an abstract or aggregate from your books?

Ans. This is a copy made from our books and papers in the bank.

Cross-int. 137. Is every entry on that found in words and figures upon your books?

Ans. Not the heading, certainly. In substance, yes.

Cross-int. 138. I ask if that is a copy, in words and figures, from your book, or is it an abstract or aggregate from your books. I don't ask if it is in substance a copy, but it is in words and figures a copy?

Ans. In figures, yes.

Cross-int. 139. Will you be kind enough to find on your books the figures entered on that exhibit, Sept. 8, '68, $464.16?

Ans. My books of this date are not here. They were not called for.

Cross-int. 140. Is there any such item on your books?

Ans. I can answer by reference to books.

Cross-int. 141. Why do you say that is a copy from your books, if you are not able to say whether those figures appear on your books?

237 Ans. I am satisfied the item appears in the books or papers of the bank. The bookkeeper made it as a copy, and I believe it to be so.

Cross-int. 142. Have you ever compared it to know whether it is a copy or not?

Ans. I think I have.

Cross int. 143. Please look at Exhibit No. 1 and state if you know who wrote the pencil figures and words on the back "150 shares"?

Ans. I couldn't state.

Cross-int. 144. In answer to the 51st direct question you have said that you made copies of M'r Hayward's notes. Did you mean that you personally made copies of them, or that you had them made by M'r Adams, before named?

Ans. I had them made by M'r Adams. I assisted him, but not doing the writing.

Cross int. 145. Have you produced the copy of the page from Bank Balances No. 1, March 27, '67, before inquired of? If so, please hand it to the examiner to be marked as an exhibit.

Ans. I do, and now produce it.

(Produced and marked "Exhibit 32, E. T. N., Examiner.")

R. B. CONANT.

Agreement.—Filed Apr. 8, 1874.

It is agreed that no objection is to be taken to any question put on cross-examination, on the ground that the subject-matter was not opened by the direct examination. All objections to questions in matters of form are waived, and all other legal objections are saved, whether taken or not.

E. F. HODGES,
For Complainants.
A. A. RANNEY,
For Defendant.

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239 EXHIBITS.

Exhibit 1.—*E. T. N., Examiner.*

$13,085$\frac{72}{100}$. BOSTON, *September 8th*, 1868.

Six months after date I promise to pay to the order of the Eliot National Bank thirteen thousand and eighty-five $\frac{72}{100}$ dollars, at Eliot Nat'l. Bank, Boston, Mass., value received, with interest at the rate of 6 per cent.

Due Mch. 8–11.

WILLIAM H. GOODWIN.

[$6.55 internal-revenue stamp.]

(Indorsed:) J. G. Weld. Also indorsed in pencil: 150 shares.

Exhibit 2.—*E. T. N., Examiner.*

Mem. of cash dividends rec'd on Hecla Mining Co. stock by William H. Goodwin:

Dec.	15, '69,	on 150 sh's	at	$5	per share	.....	$750 00
April	15, '70,	"	at	5	"	.....	750 00
Aug.	5, "	"	at	5	"	.....	750 00
Nov.	5, "	"	at	5	"	.....	750 00
January	5, '71,	"	at	5	"	.....	750 00
Feb.	15, "	"	at	5	"	.....	750 00
April	5, "	"	at	$2\frac{1}{2}$	"	.....	375 00

On Calumet & Hecla M'g Co.:

May	16, '71,	187½	at	5	per share	937 50
Aug.	16, "	225	at	5	"	1,125 00
Nov.	15, "	262½	at	5	"	1,312 50
Feb.	15, '72,	300	at	5	"	1,500 00
May	15, "	"	at	5	"	1,500 00
July	22, "	"	at	5	"	1,500 00
Aug.	15, "	"	at	5	"	1,500 00
Oct.	7, "	"	at	5	"	1,500 00
Nov.	15, "	"	at	5	"	1,500 00
January	15, '73	"	at	5	"	1,500 00
						$18,750 00

240 *Exhibit* 3.—*E. T. N., Examiner.*

BOSTON, *Nov.* 9, 1867.

I hereby authorize the president and directors of the Eliot National Bank to sell, at their discretion, four hundred and fifty shares of stock of the Hecla Mining Company, held as collateral security for loan, proceeds of sale to be applied upon said loan.

To the president and directors of the Eliot Bank.

CHA'S L. HAYWARD.

Exhibit 4.—*E. T. N., Examiner.*

BOSTON, *Sept.* 11, 1872.

To the Eliot National Bank:

On the 11th of March last I demanded of you an account of the amount claimed by you to be due from me for loans made in Oct., 1866, and assessments paid on Hecla stock and interest. I refer to that demand for particulars. You decline to render such account and consequently I cannot make a tender of a specific sum. Not waiving that demand or in any way changing the relations between us thereby established, I now demand of you 450 shares of the Hecla Mining Co. stock, or 900 shares of the Calumet and Hecla Mining Co. stock issued in the place of said Hecla stock and as dividends, and I tender to pay all sums due from me to the bank for which the same are holden. It is my purpose to avail of any increased value of the stock and not incur any risk of future depreciation. Will you signify to Mess'rs Hodges & Barrett, 42 Court street, your purpose in the premises, and when you are prepared to deliver the stock, they will receive it and pay the sum for which it is lawfully held, and their action will be accepted by me.

Resp'y, your ob't se'v't,

CHA'S L. HAYWARD.

Exhibit 5.—*E. T. N., Examiner.*

(Copy.)

JOHN DEMERITT, *President.* R. B. CONANT, *Cashier.*

ELIOT NATIONAL BANK.

Capital, $1,000,000.

BOSTON, *Sept.* 12, 1872.

CHA'S L. HAYWARD, Esq.:

DEAR SIR: Your singular and unwarranted note of Sept. 11th,

241 1872, is received. Your statement of facts contained in it is not true, as you must be aware. When the stock pledged was sold by your authority you had an account and statement which was approved and assented to by you. If you have not read our answer in the suit brought, we beg leave to refer you to that for our claim and position in the premises. If you have read it you must see the futility of the demand which you now make and cannot fail to understand our position, both from this and your own knowledge and acts as alleged therein.

Truly, yours,

(Signed) ELIOT NATIONAL BANK.

Exhibit 6.—E. T. N., Examiner.

DEBIT.

April	1, '67	$1,723 33	$20,000 00
"	1, '67	560 08	6,500 00
July	23, '67	152 45	2,263 00
Aug.	9, '67	89 63	1,379 03
April	24, '68	41 10	1,827 00
Dec.	26, '67	95 42	2,263 12
Oct.	11, '67	123 00	2,250 00
		$2,785 01	$36,472 15
Stamp.		Int.	2,785 01
655		$2,283 41	$39,257 16
		$502 60	$13,085 72
$9,972 15			TUESDAY, Sept. 8, 1868.

Exhibit 7.—E. T. N., Examiner.

BOSTON, *Mar. 11th*, 1872.

To the Elliot National Bank:

Will you please render an account of the amount now due upon the loans ($20,000 and $6,500) made to me by the bank in October, 1866, and for which I pledged as collateral security four hundred and fifty shares of the capital stock of the Hecla Mining Co.

242 The principal of said loan, and all assessments upon said stock paid by the bank, together with all interest upon said sums, now due and unpaid by the cash dividends received upon said stock, I am ready and desire to pay. It is my purpose to redeem said stock, and to pay all moneys for which it is lawfully holden.

Will you deliver said account to Mess'rs Hodges & Barrett, my counsel, or their order.

I am resp'y yours, &c.,

CHA'S L. HAYWARD.

P. S.—Mess'rs Hodges & Barrett have offices at 42 Court st., Boston.

Exhibit 8.—*E. T. N., Examiner.*

(Copy.)

ELIOT NATIONAL BANK.

JOHN DEMERITT, *President.* R. B. CONANT, *Cashier.*

Capital, $1,000,000.

BOSTON, *March 11th*, 1872.

I have to reply to a communication, dated Mar. 11th, and signed by you, that the account referred to was rendered and settled by M'r Demeritt a long time since.

Resp'ly yours,

R. B. CONANT, *Cash.*

To CHA'S L. HAYWARD, Esq.

Exhibit 9.—*E. T. N., Examiner.*

(Copy.)

BOSTON, 3 *Sept.*, 1867.

To JOHN DEMERITT, Esq., *President Eliot Nat'l Bank:*

DEAR SIR: Please sell the United States bonds your bank holds for my account, and settle my note due on same; any balance remaining please pass to my credit.

Yours truly,

CHA'S L. HAYWARD.

243 *Exhibit* 10.—*E. T. N., Examiner.*

Statement of transactions of temporary loan of Eliot National Bank with regard to loan to C. L. Hayward on Hecla Mining Company stock.

1866.	Oct. 17.	To "C. L. H."	$6,500 00
	" 22.	"C. L. H."	20,000 00
1867.	July 24.	"Assessment in Hecla"	2,253 00
	Aug. 9.	"450 shares Hecla"	1,350 00
	" 9.	" " Int."	29 03
	Oct. 11.	"Assessment Hecla"	2,250 00
	Dec. 26.	" "	2,250 00
	" 26.	" " Int	13 12
1868.	April 24.	"Assessment Hecla M. Co."	1,827 00
			$36,472 15
1868.	Sept. 8.	By "C. L. Hayward"	$36,472 15
			$36,472 15
Interest on above loans was			2,785 01
Interest in detail to Sept. 8, 1868, @ 6 per cent.:			
April 1, 1867, on 20,000 L			$1,723 33
" 1, " on 6,500 L			560 08

July	23, "	on 2,253 ass't		152 45
Aug.	9, "	on 1,379.03 "		89 63
April	24, 1868,	on 1,827 "		41 10
Dec.	26, 1867,	on 2,263.12 "		95 42
Oct.	11, "	on 2,250 "		123 00
				$2,785 01
	Sept. 8, 1868.	Interest @ 1 per cent. on above		$464 16
				$464 16
244	Sept. 3, 1867.	Proceeds sale U. S. bonds in excess of loan and int. same	$375 63	
		Int. same from Sept. 3, 1867	26 61	
		Balance due	62 52	
				$464 16

Exhibit 11.—*E. T. N., Examiner.*

(Receipts for assessments, five in number, produced, and marked for identification, "Exhibit 11, E. T. N., Examiner.")

Exhibit 13.—*E. T. N., Examiner.*

(Copy.)

Hecla Mining Company of Michigan. Interest due $13 12

BOSTON, *Dec. 26th*, 1867.

Received of R. B. Conant, cashier, twenty-two hundred and fifty dollars for assessment No. 5, due Nov. 21st, 1867, on 450 shares Hecla Mining Company of Michigan, standing in his name.

October 21st, 1867.

CHARLES W. SEABURY,
Treasurer.

$2,250.
[Two-cent stamp.]

Certificate No. 24.
25.

(Copy.)

HECLA MINING COMPANY OF MICHIGAN.

BOSTON, *Oct. 11th*, 1867.

Received of R. B. Conant, cashier, twenty-two hundred and fifty dollars for assessment No. 4, due Sept. 24, 1867, on 450 shares Hecla Mining Company of Michigan, standing in his name August 31st, 1867.

CHA'S W. SEABURY,
Treasurer.

$2,250.
[Two-cent stamp.]

Certificate No. 24.
25.

245 [Copy.]

HECLA MINING COMPANY OF MICHIGAN.

BOSTON *April* 24, 1868.

Received of R. B. Conant, cashier, eighteen hundred dollars, for assessment No. 6, due Jan. 21, 1868, on 450 shares Hecla Mining Company of Michigan, standing in his name Dec. 31, 1867.

$1,800. C. W. SEABURY,
Treasurer.

(Int. $27.)
[Two-cent stamp.] Certificate, No. 24, 25.

[Copy.]

HECLA MINING COMPANY OF MICHIGAN.

Ass't	1,350	00
Int.	29	03
	1,379	03

BOSTON, *Aug.* 9, 1867.

Received of R. B. Conant, cash'r, thirteen hundred and fifty dollars, for assessment due Ap'l, 1867, on 450 shares Hecla Mining Co. of Michigan, standing in his name on the 1 April, 1867.

Q. A. SHAW,
Treasurer,
$1,350 p O. A. FARWELL.
[Two-cent stamp.]

[Copy.]

HECLA MINING COMPANY OF MICHIGAN.

As't	$2,250
Am.	3
	$2,253

BOSTON, , 1867.

Received of R. B. Conant, cash'r, twenty-two hundred and fifty dollars, for assessment due July 15, 1867, on 450 shares Hecla Mining Company of Michigan, standing in his name on the 15 July, 1867.

Q. A. SHAW,
$2,250. p. O. A. FARWELL,
Treasurer.

[Two-cent stamp.]

246 *Exhibit 14.—E. T. N., Examiner.*

[Copy.]

MONDAY, *Sept.* 7, 1868.

Present, Demeritt, Goodwin, White, and Proctor.

Disct. as per sheet 37.

Resignation of M'r S. A. Cushing sent to board for action. Accepted the same, and instructed the cashier to present him with complimentary letter for faithful services since the bank was organized.

Voted that E. B. Cushing be appointed to succeed S. A. Cushing in the position of collection-clerk and messenger.

Exhibit 15.—*E. T. N., Examiner.*

HECLA MINE.

Dec. 15th, 1869,	$5.00	per share.
Apr. 15th, 1870,	5.00	"
Aug. 5th, "	5.00	"
Nov. 5th, "	5.00	"
Jan'y 5th, 1871,	5.00	"
Feb. 15th, "	5.00	"
Apr. 5th, "	2.50	"
	$32.50	total per share.

Paid to W'm H. Goodman, Jos. H. White, Jno. P. Robinson, on the 450 shares transferred to them by R. B. Conant, cashier.

C. W. SEABURY,
Treas'r.

CALUMET AND HECLA MINING CO.

May 15th, 1871,	$5	and issue of	1 in 4	shares of old stock.
Aug. 15th, "	5	"	1 " 5	"
Nov. 15th "	5	"	1 " 6	"
Feb. 15th, 1872,	5	"	1 " 7	"
May 15th, "	5			
July 22d, "	5			
Aug. 15th, "	5			
247 Oct. 7th, 1872,	5			
Nov. 15th, "	5			
Jan'y 15th, 1873,	5			
Feb. 15th. "	5			
	$55			

Issued to W'm Goodman, Jos. H. White, and Jno. P. Robinson, on the 450 sh's transferred to them by R. B. Conant, cashier.

C. W. SEABURY,
Treas'r.

Exhibit 16.—*E. T. N., Examiner.*

Know all men by these presents that, for value received, I, Cha's L. Hayward, of , do hereby make, constitute, and appoint, irrevocably, true and lawful attorney (with power of substitution), for me and in my name, and on behalf, to sell, assign, and transfer unto R. B. Conant, cashier, three hundred and fifty (350) shares now standing in my name in the capital or joint stock of the Hecla Mining Company.

And , said attorney, is hereby fully empowered to make and pass all necessary acts for the said assignment and transfer.

Witness my hand and seal, 19th October, 1866.

CHA'S L. HAYWARD. [SEAL.]

Signed, sealed, and delivered in the presence of—
GEO. W. WEST.

[25 c stamp.]

For value received, appoint irrevocably, as substitute, with all the powers above given, to .
Witness hand and seal, 185 .
Signed, sealed and delivered in the presence of—

[SEAL.]

A true copy of original. Attest:

C. W. SEABURY,
Treas'r.

248 Know all men by these presents that, for value received, I, Cha's L. Hayward, of do hereby make, constitute, and appoint, irrevocably, Geo. W. West true and lawful attorney (with power of substitution), for me and in my name, and on my behalf, to sell, assign, and transfer unto R. B. Conant, cashier, one hundred (100) shares, now standing in my name, in the capital joint stock of the Hecla Mining Company.

And , said attorney, is hereby fully empowered to make and pass all necessaay acts for the said assignment and transfer

Witness my hand and seal, 17th October, 1866.

CHA'S L. HAYWARD. [SEAL.]

Signed, sealed. and delivered in the presence of—
GEO. W. WEST. [25 c stamp.]

For value received, appoint irrevocably, as substitute, with all the powers above given, to .
Witness hand and seal, 185 .
Signed, sealed and delivered in the presence of—

[SEAL.]

A true copy of original. Attest:

CHA'S W. SEABURY,
Treas'r.

Exhibit 17.—*E. T. N., Examiner.*

No. transfer, 32. No. certificate, 25.

From Cha's L. Hayward to R. B. Conant, cashier, for 350 shares.

BOSTON, *Oct.* 23*d*, 1866.

Received certificate, as above, of the Hecla Mining Company.

GEO. W. WEST.

HECLA MINING COMPANY.

Certificate No. 25. 350 shares.

(Organized under the general mining law of the State of Michigan.)

This is to certify that R. B. Conant, cashier, is the proprietor of three hundred and fifty shares in the Hecla Mining Company,
249 subject to the by-laws, and transferable only on the books of said company by the holder hereof in person, or by a conveyance in writing, recorded in said books, and surrender of this certificate.

Boston, Oct. 23, 1866.

[SEAL.] QUINCY A. SHAW,
President.

ALEX. AGASSIZ, *Treasurer.*

A true copy of original.—Attest:

C. W. SEABURY,
Treasurer.

For value received, hereby assign to of shares of the within Hecla Mining Company.
Boston, A. D., 186 .

JOHN DEMERITT,
President.

A true copy of indorsement.—Attest:

C. W. SEABURY,
Treas'r.

Exhibit 18.—*E. T. N., Examiner.*

No. transfer, 29. No. certificate, 24.
From Cha's L. Hayward to R. B. Conant, cashier, for 100 shares.

BOSTON, *Oct.* 23, 1866.

Received certificate, as above, of the Hecla Mining Company.
GEO. W. WEST.

HECLA MINING COMPANY.

Certificate No. 24. 100 shares.

(Organized under the general mining law of the State of Michigan.)

This is to certify that R. B. Conant, cashier, is the proprietor of one hundred shares in the Hecla Mining Company, subject to the by-laws, and transferable only on the books of said company by the holder hereof, in person, or by a conveyance in writing recorded in said books, and surrender of this certificate.

Boston, Oct. 23, 1866.
[SEAL.]

QUINCY A. SHAW,
President.

ALEX. AGASSIZ, *Treasurer.*

A true copy of original.—Attest:

C. W. SEABURY,
Treasurer.

250 For value received hereby assign to of shares of the within Hecla Mining Company.
Boston, A. D., 186 .

JOHN DEMERITT,
President.

A true copy of indorsement.—Attest:

C. W. SEABURY,
Treasurer.

Exhibit 19.—*E. T. N., Examiner.*

HECLA MINING COMPANY.

No. transfer, 265. No. shares, 150. No. old certificate, 25. No. new certificate, 263. D'r 43. C'r 107.

For value received, I hereby transfer to W'm H. Goodwin, of Boston, one hundred and fifty (150) shares of the capital stock of the Hecla Mining Company, subject to the provisions of the charter and to the by-laws of the corporation.

Dated at Boston, Sept. 8th, A. D. 1868.

JOHN DEMERITT, *Pres't,*
For R. B. CONANT, *Cash.*
E. P. ADAMS, *Att'y.*

A true copy of original.—Attest:

C. W. SEABURY,
Treas'r.

HECLA MINING COMPANY.

No. transfer, 266. No. shares, 150. No. old certificate, 25. No. new certificate, 264. D'r 43. C'r 107.

For value received, I hereby transfer to Joseph H. White, of Boston, one hundred and fifty (150) shares of the capital stock of the Hecla Mining Company, subject to the provisions of the charter and to the by-laws of the corporation.

Dated at Boston, Sept. 8, A. D. 1868.

JOHN DEMERITT, *Pres't*,
For R. B. CONANT, *Cash.*
E. P. ADAMS, *Att'y.*

A true copy of original.—Attest:

C. W. SEABURY,
Treas'r.

251 HECLA MINING COMPANY.

No. transfer, 267. No. shares, 150. No. old certificate, 25 and 24. No. new certificate, 265. D'r 43. C'r 107.

For value received, I hereby transfer to John P. Robinson, of Boston, one hundred and fifty (150) shares of the capital stock of the Hecla Mining Company, subject to the provisions of the charter and to the by-laws of the corporation.

Dated at Boston, Sept. 8, A. D. 1868.

JOHN DEMERITT, *Pres.*,
For R. B. CONANT, *Cash.*
E. P. ADAMS, *Att'y.*

A true copy of original.—Attest:

C. W. SEABURY,
Treas.

Exhibit 20.—*E. T. N., Examiner.*

JOHN DEMERITT, *President.* R. B. CONANT, *Cashier.*

ELIOT NATIONAL BANK.

Capital, $1,000,000.

BOSTON, *Aug.* 18, 1868.

C. L. HAYWARD, esq.:

DEAR SIR: The following is a copy of a vote by the directors, yesterday, at the regular meeting of the board: Voted, That unless M'r Hayward pays five thousand dollars during the present week and five thousand dollars the following week upon loan having Hecla stock as collateral, the president is instructed to sell the same forthwith.

It is expected that you will give this your immediate attention.

Respectfully yours,

R. B. CONANT,
Cashier.

Exhibit 21.—*E. T. N., Examiner.*

C. L. Hayward in account with The Eliot National Bank, Boston.

D'R.

Oct. 19, 1866.	Borrowed and rec'd	$20,800	00
	Int. paid to April 1, 1867.		
252	Oct. 17, 1866. Borrowed and rec'd	6,500	00
	Int. p'd to April 1, 1867.		
July 23, 1867.	Assessment on Hecla, 450 shares	2,253	00
Aug. 9, 1867.	" " " "	1,379	03
Oct. 11, 1867.	" " " "	2,250	00
Dec. 26, 1867.	" " " "	2,263	12
April 24, 1868.	" " " "	1,827	00
	Int. on 26,500 to Sept. 8	2,283	41
	" " assessments	501	60
		$39,257	16

C'R.

Sept. 8, 1868.	By cash	$39,257 16

Exhibit 22.—*E. T. N., Examiner.*

[Copy.]

BOSTON, *Jan.* 14, 1868.

The annual meeting of stockholders of the Eliot National Bank, of Boston, was held this day, in accordance with notice given.

The meeting was called to order, M'r Demeritt in the chair, and a communication read by the clerk from M'r Cotting, declining to serve as a candidate for director. It was moved and seconded that the chairman appoint a committee of three to act as judges of election and conduct the same; and the chairman appointed John D. Parker, Edwin T. Wilson, and Stephen Tilton to act as judges of election, who proceeded to collect ballots for a list of directors, and reported as a result: Number of ballots cast 11, representing 1,540 shares, all of which were for John Demeritt, John P. Robinson, J. H. White, W. H. Goodwin, George A. Curtis, Stephen Tilton, Walter Hastings, and Thomas E. Proctor; and these gentlemen were declared duly elected by the judges of election directors of the Eliot National Bank for the ensuing year.

(Signed) JOHN D. PARKER,
Chairman.

R. B. CONANT, *Clerk.*

253 *Exhibit* 23.—*E. T. N., Examiner.*

Please examine at once and report.

C. L. Hayward, in account with the Eliot National Bank, Boston.

1866. D'R.		1866. C'R.	
Oct. 7. To	$892 65	Oct. 17. By balance	$6,585 89
18	9,550 00	17	8,040 50
19	1,219 87	18	36 52
20	8,104 89	19	3,525 00
22	22,291 06	20	3,757 50
23	1,442 01	22	23,325 00
24	4,045 26	23	3,051 77
25	5,216 00	24	2,850 00
26	1,427 00	25	5,168 00
27	103 00	26	50
29	1,047 25	27	220 00
30	646 41	29	435 72
31	4,924 83	30	2,262 50
Nov. 2	182 00	31	2,925 00
3	700 00	Nov. 1	181 00
5	4,500 00	5	8,417 00
6	7,777 43	6	5,206 50
7	1,293 00	7	2,152 50
8	1,984 26	8	9,171 50
9	8,297 91	9	1,000 00
10	522 44	12	6,026 25
12	914 61	13	1,400 00
13	6,832 94	14	1,480 16
15	1,075 00	15	6,022 35
16	6,783 18	16	3,060 42
17	975 25	17	865 50
19	878 00	26	9,640 75
21	168 50	27	1,104 00
22	1,950 00	28	4,952 00
23	1,155 91	30	2,463 25
26	6,111 63	Dec. 1	3,505 00
27	2,804 01	3	865 50
254 28	4,883 56	4	9,143 75
30	1,149 88	5	3,000 00
Dec. 1	2,765 43	7	5,804 00
3	3,638 37	11	2,172 75
4	862 83	14	867 17
5	4,244 10	19	3,233 61
6	8,146 94	20	3,956 58
7	4,564 08	1867.	
10	265 67	May 3	3 14
12	2,167 50		
13	100 00		
14	103 50		
15	864 67		
18	533 69		
19	20 00		
20	2,655 00		
21	3,946 33		
22	759 35		

Exhibit 23.—Continued.

D'R.		C'R.	
1867.			
Jan. 12.....	49 50		
14.....	357 52		
17.....	15 00		
Apr. 10.....	10 77		
Balance	9 04		
	$157,879 03		$157,879 03
		1873.	
		April. Balance.....	$9 04

Exhibit 24.—*E. T. N., Examiner.*

BOSTON, *September* 12, 1872.

CHA'S L. HAYWARD, Esq.

DEAR SIR: Your singular and unwarranted note of Sept. 11th, 1872, is received.

Your statement of facts contained in it is not true, as you must be aware. When the stock pledged was sold by your authority, you
255 had an account and statement, which was approved and assented to by you. If you have not read our answer in the suit brought, we beg leave to refer you to that for our claim and position in the premises. If you have read it, you must see the futility of the demand which you now make, and cannot fail to understand our position, both from this and your own knowledge and acts as alleged therein.

Truly yours,

ELIOT NATIONAL BANK,
JOHN DEMERITT, *Pres't.*

Exhibit 25.—*E. T. N., Examiner.*

35 COURT ST., 12 *Sept.*, 1872.

DEAR SIR: Enclosed is letter sent me by bank, which it received from Cha's L. Hayward, and also my answer thereto.

Please read answer, sign it, and return to me, and I will see that it is delivered.

Truly yours,

A. A. RANNEY,
By C. A. CARPENTER.

JOHN DEMERITT, Esq,
Pres. Eliot Nat. Bank.

Exhibit 26.—*E. T. N., Examiner.*

$6,500.] BOSTON, 17*th Oct.*, 1866.

Borrowed and received of R. B. Conant, cashier, sixty-five hundred dollars, which I promise to pay on demand, with interest.

On 100 shares Hecla Mining Co.

CHA'S L. HAYWARD.

[$3.00 stamp. 25 c't stamp.]

(Indorsed:) Int. paid to April, 1867.

256 *Exhibit* 27.—*E. T. N., Examiner.*

$20,000.] BOSTON, 19*th Oct.*, 1866.

Borrowed and received of R. B. Conant, cashier, twenty thousand dollars, which I promise to pay on demand, with interest.

On 350 shares Hecla Mining Co.

CHA'S L. HAYWARD.

[$10.00 stamp.]

(Indorsed:) Int. paid to Ap'l 1, 1867. Bal. sale of bonds. Three hundred and seventy-five $\frac{03}{100}$. Acc't int. on the within, 375.03.

Sept. 3. '67.

Exhibit 28.—*E. T. N., Examiner.*

[25-cent internal-revenue stamp.]

BOSTON, 21 *Feb.*, 1863.

For the purpose of opening a credit with the Eliot Bank, the subscriber has deposited with the said bank certain securities, with the power to transfer the same, and may thereafter deposit bullion, coin, or other securities, with like power to transfer. I hereby waive all and every objection to the manner in which said securities may be sold, whether at private or public sale, or at the board of brokers, without any demand or notice whatever.

CHA'S L. HAYWARD.

Exhibit 29.—*E. T. N., Examiner.*

Acc't C. L. Hayward.

Ap'l 1, '67	$2,010 55	$20,000 09
" 1, '67	653 42	6,500 00
July 23, '67	177 86	2,253 00
Aug. 9, '67	104 57	1,379 03
Ap'l 24, '68	47 95	1,827 00
Dec. 26, '67	111 32	2,263 12
Oct. 11, '67	143 50	2,250 00
	$3,249 17	$36,472 15
@ 1 less	464 16	
	$2,785 01	

257

$464 16	
375 03	paid on acc't of int. Sep. 3, '67.
$89 13	bal. due.
26 61	less int. to Sep. 8, '68.
$62 52	

Int. $375.03 from Sep. 3, '67, to Sep. 8, '68.

1–5.

Exhibit 30.—*E. T. N., Examiner.*

C. L. Hayward.

	$3,000	50 shares O. and L. C. R. R.
100 W. Power.	3,200	Sept. 24, '66.
	6,200	
	3,000	P'd and int. p'd.
	3,200	
	4,500	Oct. 13.
	7,700	
100 Hecla.	6,500	Oct. 17.
	14,200	
G'd	20,000	Oct. 19. 350 Hecla.
	34,200	
	3,200	W. P. Oct. 2d, and int.
	31,000	
	4,500	Nov. 6.
	26,500	
	2,000	Nov. 6.
	28,500	
	1,000	Nov. 16.
258	27,500	
	1,000	Nov. 30. C.
	26,500	
	2,253	As't on 250 sh's Hecla.
	28,753	
	1,379 03	
	$30,132 03	

Exhibit 31.—*E. T. N, Examiner.*

C. L. Hayward.

Interest	on	$20,000.00	to	October 1	.....	$700 00
"	"	6,500.00	"	"	.....	227 50
"	"	2,253.00	"	"	.....	32 85
"	"	1,379.03	"	"	.....	48 26
						$1,008 61
				Less paid	.....	375 03
				Bal. due up to Oct. 1, '67	.....	633 68

26, 1867.

Deposits.			Balanc
		301, 405 07	
			1, 93
			34, 6
		8, 656 74	10, 1
....	59 20	59 20	*1
			*150, 0
		15	35
			15
		14	46
			30
			15
			15
			30
			20
			1, 000
		20	20
			800
			5, 4
			9
			*1, 8
			63, 9
. T ..		143 27	
ros..	294 68	294 68	39, 9
			186, 1
			*10, 9
			*9, 2
			*996
....	2, 400		
....	1, 237 25		
...	360 48		
....	400	4, 398 23	*278, 6
		32, 708 28	*1, 337, 1
	*1, 010		
	*740		
	*37, 801 66	396, 665 47	*509, 5
	*251, 070		
	*218, 893 81		

260 *Exhibit* 33.—*E. T. N., Examiner.*

The following is a correct statement of the price of Hecla Mining stock at the several dates named:

1866.	Oct. 13,	$50	per share.		
	16,	60 to 75	"		
	November —	No sales.			
	December 8,	51¼ } By auction.			
	" 22,	45¾ }			
1867.	Jan. 3d, 4th, 5th, 8th, 19th, & 24th, $50 per share.				
	Feb. 14,	$45	per share.		
	March 4 and 5,	45	"	"	ass't paid $3 p'r sh.
	April —	No sales.			
	May —	"			
	June —	"			
	July 6th, 8th,	25	"	"	ass't paid $3 p'r sh.
	" 13,	20	"	"	
	" 16,	15	"	"	
	" 30.	20	"	"	
	Aug. 12,	20	"	"	
	" 30,	20	"	"	
	Sept. 2,	25	"	"	
	" 12,	28	"	"	
	" 25,	32	"	"	ass't paid $5 p'r share.
	" 27,	35	"	"	
	" 28,	37	"	"	
	Oct. 3,	35	"	"	
	" 9,	37	"	"	
1867.	Oct. 22,	36	"	"	ass't paid $5 p'r share.
	Nov. 4th, 16th,	38	"	"	
	" 17,	37½	"	"	
	December —	No sales.			
1868.	Jan. 21 and 22,	30	"	"	
	Feb. 10, 19, 30,	40	"	"	
	" 24,	39	"	"	
	March 27,	40	"	"	
	April,	40½ to $45	"	"	
261	1868. May 25,	$40	per	share.	
	June 22,	45	"	"	
	July,	47 to $50	"	"	
	August,	60 to $70	"	"	
	Sept. 5,	76	"	"	

262 The following is the opinion of the court in said cause, read by the honorable Nathan Clifford, associate justice, on the sixth day of October, A. D. 1874, namely:

Opinion of the court.

Circuit court of the United States, district of Massachusetts. In equity.

May term 1874, to wit, Oct. 6, 1874.

CHARLES L. HAYWARD }
v. }
ELIOT NATIONAL BANK. }

CLIFFORD, *J.:*

Controversies like the present cannot be satisfactorily determined

without some reference to the pleadings which immediately respect the material matters in issue, as where the answer is responsive to the bill, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the party making it, the answer is evidence in his favor; and unless the answer is overcome by
263 the testimony of two opposing witnesses, or of one witness, corroborated by facts and circumstances which give the opposing evidence greater weight than the answer, the rule in equity is, that the answer is conclusive, so that the court will neither make a decree in favor of the complainant, nor send the case to trial, but will simply dismiss the bill of complaint. (Badger v. Badger, 2 Cliff, 146.)

Briefly stated, the material facts alleged in the bill are that the complainant, at the time mentioned in the record, borrowed of the respondents the sum of twenty-six thousand and five-hundred dollars, and that he agreed to pay lawful interest for the same; and that he pledged with the lenders, as collateral security for the payment of the amount borrowed and lawful interest, four hundred and fifty shares of the stock of the Hecla Mining Company, which belonged to the complainant, and which, as he states, he caused to be issued to the respondents for
264 that purpose; that the said Mining Company, subsequently, by an arrangement with the Calumet, united their property and privileges with those of the latter-named company, two other companies joining with them, and that the several companies became a new corporation by the name of the Calumet and Hecla Mining Company, with a capital of forty thousand shares, or more, whereby the respondents, as holders of the said shares so issued to them, became entitled to and did take four hundred and fifty shares of the stock in the new corporation; that the said new company has, from time to time, since the said several companies were united, made sundry dividends in cash and stock, by virtue of which it has divided to its stockholders valuable portions of its earnings and property, as therein more fully set forth. Other important matters are alleged in the bill, and the complainant prays for an account, and that he may be allowed to redeem the
265 shares pledged, which, as he alleges, the respondents still hold as collateral security; and he charges that no valid sale has been made of said shares; that if the respondents have pretended to sell the same, or any part thereof, or have done any act or thing having a tendency to transfer the title in said shares to any other party, or have procured or permitted certificates for said shares to issue to any other persons, it has been done without notice to the complainant, without right, and in fraud of his just claims; and that the respondents now hold in fact, or are chargeable in law as holding, nine hundred shares of the capital stock of said new company for the complainant, and as collateral security for the payment of any balance due from him on account of said transactions. Process was issued and served, and the respondents appeared and filed an answer, in which they admit the
266 loan of the amount, the pledge of the shares as collateral security, the exchange of the shares pledged for the shares of the new company, and that dividends have been declared; but they aver that the directors of the bank, on the seventeenth of August, 1868, voted that unless the complainant should pay five thousand dollars during the then present week, and five thousand dollars during the following week, upon the loan, having the said shares as collateral, the president be instructed to sell the same; that said vote was communicated to the complainant, and that he declined to comply in whole or in part, saying that he could not pay anything, and that he would do

nothing about it; that thereupon the proposition to sell to said purchasers, and by them to buy the shares for the price and as aforesaid, was made and canvassed and determined upon, and the sale was made with the full concurrence of and with the prior assent and subsequent approval of the complainant.

267 Repeated decisions of the Supreme Court have established the rule that an answer responsive to the allegations of the bill, if it have respect to matters within the knowledge of the pleader, and be duly sworn to, must be taken to be true, unless disproved by two witnesses or by one witness and corroborative circumstances which give the opposing testimony greater weight than the answer. (Clark's Ex'rs v. Van Reimsdyk, 9 Cran., 160; Hughes v. Blake, 6 Wheat., 453; same cas., 1 Mas., 518; Union Bank v. Geary, 5 Pet., 111.)

Unsworn answers do not have that effect; but if the answer be duly sworn to, even though the suit be against a corporation, and the oath be by one of its principal officers, the answer will have that effect, if it be responsive to the bill and be clear and positive in its terms. (Carpenter v. Ins. Co., 4 How., 219; Salmon v. Claggett, 3 Bland, 165; Parker v. Phettyplace, 1 Wall., 689; Tobey v. Leonards, 2 Wall.,
268 430; 2 Story's Eq. Jur., 1528.) Apply that rule to the case, and it is clear that the complainant cannot recover, unless the proofs introduced by him are sufficient to overcome the allegations of the answer, giving to the answer the probative force which that rule prescribes, as the bill distinctly charges that no valid sale of the shares was made; that if the respondents pretend that they did any act tending to transfer the title to the shares, or that they have procured or permitted certificates of the shares to issue to any other parties, it has been done without notice to the complainant, without right and in fraud of his just rights. Nothing further can be required to show that the issue of notice is distinctly tendered by the complainant, and the record shows that the answer is directly responsive to the bill, and alleges that the vote of the directors to instruct the president of the bank to sell the shares if the pledgor failed to make the required payments was communicated to the complainant, and that he declined to make the pay-
269 ments, and stated that he could not pay anything, and would not do anything about it, and that the sale was made with the full concurrence of and with the prior assent and subsequent approval of the complainant. Beyond all doubt the complainant is bound to disprove the material averments of the answer, or he is not entitled to a decree for relief, as the rule is that the answer shall otherwise prevail.

On the seventeenth of October, 1866, the complainant borrowed of the bank the sum of six thousand five hundred dollars, and on the nineteenth of the same month he borrowed twenty thousand dollars more, which makes the amount for which the shares were pledged as collateral security. None of the principal of the loans was ever paid, but on the first of April following, the complainant paid interest to the amount of eight hundred and thirty-seven dollars and sixty-six cents, which is all that he has ever paid towards the principal or interest of the
270 loan. Seven months and more elapsed after that payment, without any other payment being made, or any steps being taken by the bank to enforce payment, when, on the ninth of November of that year, the complainant gave the president and directors of the bank authority in writing to sell the shares pledged, at their discretion, describing the shares in the writing as shares held as collateral security for a loan, proceeds of sale to be applied upon said loan. Shares of the kind were selling at that time for thirty-seven to thirty-eight dollars

per share, including the assessment of eighteen dollars which the bank had paid, or was liable to pay, on the respective shares in controversy, from which it appears that if the president and directors had sold the shares as they were authorized to do, twenty dollars per share only would have been realized to apply to the payment of the loan,
271 which would have left a deficit to be borne by the complainant of not less than fifteen thousand dollars. Considerations of the kind doubtless induced the respondents to defer the sale, and they kept the shares on the original terms until September 8, 1868, when they sold the whole amount to three of their directors for an amount which it was understood would be equal to the whole loan, the unpaid interest and charges being eighty-seven dollars and twenty-four cents per share, which the proofs show was considerably above the market value. Much discussion of the question whether the complainant was apprised that the directors had voted to instruct the president of the bank to sell the shares in case he, the complainant, failed to make the two payments specified in that vote, is unnecessary, as he admits that a copy of the vote was received by him at its date. Direct and explicit proof to that effect was also introduced by the respondents, as appears in the
272 depositions of the president and cashier. Instead of objecting to the proposed action of the bank, he stated to the president, who gave him the notice, that he could do nothing in relation to the matter, as he had no means; that the only thing the bank could do was to sell the shares for the most they could get, and that if he was ever able he would pay the balance if any remained. Enquiry was made of him by the president, if he had no friend who would take the stock out of the bank and hold it for his benefit, and he answered in the negative. Unable to obtain any encouragement from the complainant that he could do anything, the president, with the assent of all the other directors, except one who was absent, sold the shares to the three directors named in the answer, in equal proportions of one hundred and fifty shares. Proof entirely satisfactory is exhibited in the record that all the other directors present fully approved the act of sale, and
273 that the president, in making it, acted throughout by their authority. Abundant proof is also exhibited to show that the complainant was informed, before the sale was made, that the three directors proposed to make the purchase, and that he assented to the sugges ion that it might be sold to them as proposed. Suffice it to say, without entering into the details of the evidence, that the proof to that effect is full and entirely satisfactory. Information as to the proposed sale was communicated to the complainant by the then president of the bank, and he reported to the directors that he, the complainant, assented to it, or that he made no objection to the proposal. Three or four witnesses confirm these facts, and there is nothing of any moment to contradict their statements except the testimony of the complainant. His statements are very positive that he never assented to the sale of
274 the shares, but the great weight of the evidence is the other way. Superadded to that, he also states that he did not know that the shares had been sold, and that he never heard of the sale until the answer of the respondents was shown to him, as filed in this case. The statements in that behalf are very positive, but he admits that he received Exhibit No. 21 on the day the sale took place, which is a plain statement of the account between him and the bank, including a credit of cash to balance the amount of thirty-nine thousand two hundred and fifty-seven dollars and sixteen cents, which he must have understood was realized from the sale of the shares pledged as collateral security

for the loan, as it could not have been realized in any other way. Evidence was also introduced by the respondents that he not only assented that the shares might be sold before the sale took place, but that he expressed himself subsequently as gratified at the result. Express
275 statements to that effect are made by the cashier of the bank. He states that he had a conversation with the complainant subsequent to the sale, and that he expressed himself as highly gratified at being relieved from the embarrassment by the settlement of the matter of the loan. Interest, it appears from the said exhibit, was cast in making up the statement at six per cent., which, as explained by the testimony of the cashier, was a mistake, the same having been computed in his absence, which was corrected on his return, as appears by another exhibit in the record. Correctly computed, the interest was four hundred and sixty-four dollars and sixteen cents more than as computed at six per cent., from which it appears that a deduction of three hundred and seventy-five dollars and three cents should be made for a balance due to the complainant on the sale of some other bonds. Deduct that sum, and there is still due from the complainant the sum of sixty-two dollars and fifty-two cents, which the respondents claim that
276 the complainant promised to pay. In relation to that sum there is considerable conflict between the testimony of the former president of the bank and the other witnesses. Demeritt, the former president, states explicitly that the complainant promised to pay a balance, between sixty and seventy dollars, when he could; that he understood that it was the difference between six and seven per cent. discovered by the cashier in reviewing the computation of the interest which the complainant paid during the first year of the loan. On the other hand, the cashier states that there was a small sum of sixty or seventy dollars due to the bank after applying the proceeds of the sale of the shares which the complainant promised to pay when he should be able, and his explanation is that on his return to the bank he found that interest had been computed at six per cent., which he corrected, and on making the deduction of the said balance due in the former transaction it
277 left this small sum due to the bank, which the complainant in a subsequent conversation promised to pay. Difficulty attends the solution of the matter, but it is quite manifest that the former president is in error as to the origin of the small balance in supposing that it arose from the difference between six and seven per cent. in computing the interest paid four years earlier, as the books of the bank show that the computation on that occasion was correct, or that thirty-four cents in excess of seven per cent. was paid. Support to the view that Demeritt is in error as to the origin of the small balance is also derived from the answer which is sworn to by the cashier, whose means of knowledge is greater than that of the other witness. Importance is attached to the difference between the witnesses chiefly upon the ground that it has some bearing upon their credit as to the more important matter whether the complainant knew of the sale of the shares and approved it
278 after it was made. Most explicit allegations to that effect are contained in the answer, and inasmuch as the answer is directly responsive to the bill, the court is of the opinion that it is evidence for the respondents, and that the complainant has failed to overcome the allegations of notice, assent, and subsequent approval.

Bill of complaint dismissed with costs.

279 UNITED STATES OF AMERICA,
District of Massachusetts :

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record, and of all proceedings in the cause of Charles L. Hayward v. Eliot National Bank, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[SEAL.] JOHN G. STETSON,
Clerk.

280 *Citation.*

THE UNITED STATES OF AMERICA :

To the Eliot National Bank of Boston, in the district of Massachusetts, greeting :

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal obtained in the cause in equity lately determined in the circuit court of the United States for the district of Massachusetts, wherein Charles L. Hayward of said Boston, is appellant, and you an appellee, to show cause, if any there be, why the decree entered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John Lowell, district judge of the United States for the district of Massachusetts, this third day of December, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN LOWELL,
District Judge.

281 U. S. OF A., *Mass. Dist., ss :*

BOSTON, *7th Oct.*, 1875.

This is to certify that I this day summoned the within named Eliot National Bank of said Boston to appear as within directed, by giving in hand to William H. Goodwin, as president of said bank, a true and attested copy of this precept

EDWARD P. USHER,
Dep. Marshal, Dist. Mass.

Service & tr., 2.12; copy, 50—2.62.

282 Know all men by these presents that we, Charles L. Hayward, of Boston, in the district of Massachusetts, as principal, and James Lee, jr., and W'm F. Watson, both of said Boston, as sureties, are held and firmly bound unto the Eliot National Bank of Boston, in said district of Massachusetts, in the full and just sum of one thousand dollars, to be paid to the said Eliot National Bank, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the third day of December, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a circuit court of the United States, holden at Bos-

ton, within and for the district of Massachusetts, in a suit in equity depending in said court between said Charles L. Hayward, complainant, and said Eliot National Bank, defendant, decree was rendered against the said Charles L. Hayward, and the said Charles L. Hayward having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Eliot National Bank, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Charles L. Hayward shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise, to remain in full force and virtue.

CHARLES L. HAYWARD. [L. S.]
JAMES LEE, JR. [L. S.]
W. F. WATSON. [L. S.]

Signed, sealed, and delivered in presence of—
W'M ASPINWALL.
GEORGE D. RICE.
E. T. HODGES to W. F. W.
A. M. KEICH to W. F. W.

Approved:

JOHN LOWELL,
District Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 273. Charles L. Hayward, appellant, vs. The Eliot National Bank. Massachusetts C. C. U. S. Filed 21st October, 1875.

REC. 273—12

SUPREME COURT OF THE UNITED STATES.

No. 273.

CHARLES L. HAYWARD, *Appellant*,

vs.

THE ELIOT NATIONAL BANK.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

APPELLANT'S BRIEF.

E. F. HODGES,
JONA. F. BARRETT,
Counsel for Appellant.

Supreme Court of the United States.

No. 273.

CHARLES L. HAYWARD, APPELLANT,
vs.
THE ELIOT NATIONAL BANK, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

IN EQUITY.

BRIEF FOR APPELLANT.

This case comes up on appeal from the decree of the Circuit Court of the first circuit for the District of Massachusetts, dismissing the bill of the appellant (complainant in the Court below), the Presiding Justice being of the opinion that the appellees (defendants in the Court below) had upon the proofs maintained the defence set up in their answer.

GENERAL STATEMENT.

BILL.

1. The appellant filed his bill March 14, 1872, to redeem and have reconveyed to him four hundred and fifty shares in the capital stock of the Hecla Mining Company, pledged by him to the appellees on the 17th and 19th of October, 1866, as collateral for two loans of $6,500 and $20,000, made to him at those dates, respectively, together with subsequent accretions to said shares of stock, resulting from the consolidation of said mining company with the Calumet Mining Company; and from dividends, or otherwise, said four hundred and fifty shares of Hecla stock having become nine hundred shares in the capital stock of the Calumet and Hecla Mining Company, when the bill was filed.

The bill alleges that said four hundred and fifty shares of stock were the property of the appellant and were by his order issued to the appellees, as collateral security for said loans.

The bill further alleges the above-mentioned accretions to said shares of stock, and the increase of said loan from the payment by the appellees of certain assessments on said four hundred and fifty shares, laid by said Hecla Mining Company in the year 1867 and in January, 1868.

The bill further alleges that the moneys received by the appellees, or those acting for them, from dividends on said shares, will, if justly and fairly applied, nearly or quite pay the debt for which said stock stands pledged, and offers to pay any and all sums due from the appellant on account of said loans, and assessments upon said shares, with interest thereon, deducting the moneys received by the appellees therefrom as aforesaid.

The bill further alleges a demand, in writing, made by the appellant upon the appellees, under date of March 11, 1872, for an account of the amount then due upon said loans, embracing a notice of his readiness and desire to pay said loan and assessments, together with all interest upon said sums, due and unpaid by the cash dividends received upon said stock, and of his purpose to redeem said stock and to pay all moneys for which it is lawfully holden. And that to this demand the appellees replied that "the account referred to was rendered and settled by Mr. Demerritt a long time since."

The prayer of the bill is that the appellees "may be decreed to convey to the complainant said nine hundred shares of the stock of the Calumet and Hecla Mining Company; to pay over to him whatever may be due him upon taking an account of the moneys received on account of said stock."

"And for such other and further relief in the premises as may be consistent with equity and good conscience."

ANSWER.

2. The answer admits the transfer to the appellees by the appellant, "as collateral security," and as "a pledge," of the four

hundred and fifty shares of stock, as stated in the bill, and that "transfers of said stock were made and new certificates therefor were duly made, running absolutely, *in form*, to them, in the name of R. B. Conant, their cashier."

Ans., Record, p. 6.

The form of the transfers and certificates are shown in Exhibits 17 and 18.

Record, p. 163.

3. The other allegations in the bill, so far as material to establish the appellant's title to relief (unless the affirmative defence set up by the appellees is maintained) are also admitted by the answer or *proved* by testimony in respect to which there is no controversy.

4. The appellees aver in their defence a *sale* of the pledged stock to three of their directors, at private sale, consummated Sept. 8, 1868, in pursuance of an agreement previously entered into, in which agreement, they further aver, the appellant concurred.

5. The following passages quoted from the answer contain the material averments bearing upon the defence as it is therein stated.

After stating that the appellees "let said debt lie, to their great annoyance and embarrassment, until Sept. 8, 1868," the answer continues.

Record, p. 8 (beginning at line 10).

"When, by virtue of the express authority in writing and otherwise, they sold the same to John P. Robinson, J. H. White, and W. H. Goodwin, in equal shares, to wit: 150 shares to each for the sum of $13,085.72, amounting in the aggregate to $39,257.16, the then indebtedness of said complainant, as figured to that date, as afore-said; that the same was sold at private sale, and the stock was duly transferred to them respectively, save that the said Goodwin bargained for his said 150 shares for himself and J. G. Weld, who bought it on joint

account as between themselves, and new certificates were issued by said Hecla Mining Company, upon proper transfers, and delivered to said purchasers accordingly, said Goodwin taking his and said Weld's said portion; that this sale and transfer, with the account of said complainant, cast up as aforesaid, were reported and returned to him at or about the time when they were made, and the proposition of the defendants to sell to said purchasers, and their purpose to buy in that way and on said terms, was submitted to said complainant specifically before the sale was made, and he not only assented to its being made, and requested that it might be made, but expressly and formally approved of it when done, making known his entire satisfaction with the transaction, and stated that he was glad and delighted that he had been 'taken from under the harrow,' as he expressed it in substance; that in making said sale, the purpose and proposition was to sell the stock at a price which would cover the said indebtedness entirely; and it was supposed at the time, according to the figures of a clerk in making up the account, that this was done; and the borrowed and received memorandums, which said complainant gave at the time for said loans, and which the defendants still held, were given to the president of the bank, John Demerrit, to be delivered to him; but it was found by him or the cashier, on an accurate or more careful computation with the agreed and legal rate of interest, that there was a balance of about sixty dollars still due; that this was stated to the complainant by the president of defendant's corporation, and he agreed that it was so, and promised to pay that balance soon, or as soon as he could do so, and then would take up the memorandums and close up the matter; that he delayed doing so from alleged inability or want of means, and the matter on this account remained unadjusted, so far as the payment of said balance was concerned, but not otherwise."

The answer then sets out a power of sale in writing, dated Nov. 9, 1867.

Record, p. 9.

And repeats its averments of prior assent and subsequent ratification, in several forms, viz.: —

"The proposition to sell to said purchasers, and by them to buy, for the price and as aforesaid, was made and canvassed and determined upon, and the sale made with the full concurrence of, and with the prior assent and subsequent approval of said Hayward, as aforesaid."

Record, p. 9.

"That in making said sale, the purchasers did not act as directors in behalf of the bank, but the bank, through other officers and directors of the bank, acted in their behalf, and authorized and made said sale; that in addition to this, the complainant was duly informed and consulted by the defendants, and gave his express assent to and subsequent sanction of the sale and transfer, as made, and with full knowledge of the facts, all as aforesaid."

Record, p. 10.

6. The stock which is the subject of this controversy has always held an exceptional and extraordinary position.

At the date of the loan it stood in the market at from $60 to $75 per share, when only $3 per share had been assessed on it, — its nominal par being $25 per share.

Prior to Feb. 10, 1868, it experienced fluctuations, falling at one time as low as $20.

But after Feb. 10, 1868, it almost *continuously appreciated* ~~almost~~ up to Sept. 8, 1868, reaching $70 in August, 1868; $76, Sept. 5, 1868; and $88, Sept. 19, 1868.

Martin, dep., Record, p. 63.
Exhibit 33, Record, p. 171.

From Sept. 19, 1868, to Octobor 20, 1870, it varied from $75 to $100, below which last-named price it never after fell.

It paid a cash dividend of $5 per share Dec. 15, 1869, and has continued to pay extraordinary dividends in cash ever since. In addition, as early as Feb. 15, 1872 (after the consolidation of the Hecla & Calumet Companies), it had paid dividends in stock, amounting to share for share, thus increasing the number of shares from four hundred and fifty to nine hundred

shares, at which last date the stock stood in the market at from $114 to $135 per share.

Martin, dep., Record, p. 63.
Exhibit 2, Record, p. 156.

At the time the bill was filed, it had reached $150 per share; the market value of the stock dividends upon the original four hundred and fifty shares amounting to $67,500, and the amount of the *cash* dividends alone, upon all the shares, to about $29,250.

Martin, dep., *ub sup.*
Exhibit 2, " "

QUESTIONS INVOLVED.

The principal questions for discussion arise upon the defence, and embrace —

1. Certain questions as to its interpretation upon the answer and the evidence explanatory of the averments in the answer.
2. The question whether the appellees have maintained their defence by competent and sufficient proof, involving —
3. The question of the probative force of the answer.

I.

INTERPRETATION OF THE DEFENCE.

1 PROPOSITION.

The sale averred in the answer was not an *adverse* sale under the power of sale, or "authority in writing," referred to and set out, nor in the exercise of the rights of the appellees, as pledgees, to sell the pledged stock upon the pledgor's default.

But a sale in *intended* pursuance of a prior, *executory, conditional contract of sale*, in which the appellant, the appellees, and the three directors, to whom the stock was on the 8th September, 1868, transferred, concurred and joined, and by which the appellant agreed to sell the stock to the three directors, and the

ASSIGNMENT OF ERRORS.

The appellant assigns for error in the decree the following:

1. The finding by the judge who heard the cause in the circuit court, that the appellees had, upon the evidence, maintained the defence set up in their answer, and the decree, thereupon, dismissing the appellant's bill.

2. That the judge gave to the answer the probative effect of a sworn answer upon the principal controverted questions of fact, although the bill did not call for an answer on oath, nor make the cashier of the appellees, who made oath to the answer, nor any other officer, a defendant; and notwithstanding the answer was not under the corporate seal of the appellees, and was not sworn to before a magistrate authorized by the rules of this court or said circuit court to administer such oath.

3. That the judge held that the answer was directly responsive, in its averments of notice, and of prior assent to, and subsequent ratification of, the sale set up in the answer.

4. That the judge held the answer responsive to the bill in respect to matters not within the knowledge of the officer swearing to it.

"Monday, Aug. 17, 1868. Present, Demerritt, Robinson, Curtis, White and Proctor. That unless Mr. Hayward pays $5,000 during the present week, and $5,000 the week following upon loan having Hecla Stock as collateral, the president is instructed to sell the same."

Record, p. 9.

But it seems that some time between the date of this vote and Sept. 8, 1868, *three of the directors* had become disposed to purchase the pledged stock (for certain reasons stated in the answer, as the appellees say, but for certain other reasons disclosed in the evidence, as the appellant will contend), and the president and these three directors thought it preferable to enter into negotiation with the appellant in respect to the disposition of the stock, rather than proceed to sell it *adversely* under their written power of sale.

latter agreed to purchase it, upon the *express terms and conditions* that the three directors should pay the entire amount of the appellants' indebtedness to the appellees, including the loan, assessments and interest, and the appellant be entirely discharged therefrom, and authorizing the appellees, thereupon, to transfer the stock to the three directors.

A. It appears from the answer that on the 9th November, 1867, appellant gave appellees the "authority in writing" below.

"Boston, Nov. 9, 1867. I hereby authorize the President and Directors of the Eliot National Bank to sell at their discretion four hundred and fifty shares of stock of the Hecla Mining Company, held as collateral security for loan, proceeds of sale to be applied upon said loan.

"To the President and Directors of the Eliot Bank.

(Signed)

"Charles L. Hayward."

Record, p. 9.

And that on the 17th August, 1868, the following vote was passed by the directors: —

"Monday, Aug. 17, 1868. Present, Demerritt, Robinson, Curtis, White and Proctor. That unless Mr. Hayward pays $5,000 during the present week, and $5,000 the week following upon loan having Hecla Stock as collateral, the president is instructed to sell the same."

Record, p. 9.

But it seems that some time between the date of this vote and Sept. 8, 1868, *three of the directors* had become disposed to purchase the pledged stock (for certain reasons stated in the answer, as the appellees say, but for certain other reasons disclosed in the evidence, as the appellant will contend), and the president and these three directors thought it preferable to enter into negotiation with the appellant in respect to the disposition of the stock, rather than proceed to sell it *adversely* under their written power of sale.

In other words, the appellees, having the undoubted right as pledgees (the pledgor being in default) to sell adversely, at public auction, on proper notice of the time and place of sale, the president and the three gentlemen who desired to buy rightly concluded that their only proper course was to resort to negotiation with the pledgor.

The purpose of selling the stock adversely having been signified to appellant by the vote of Aug. 17, they, no doubt, considered that, equally with the corporation itself, its directors were trustees of the appellant for sale; the directors of a corporation constituting, as Ch. J. Shaw says, "to all purposes of dealing with others, the corporation."

Burrill *v.* Nahant Bank, 2 Met. 163.

And they were not ignorant that, occupying that relation to the pledgor, they could not become the purchasers of the stock, at public or private sale, either from themselves or from any number of their co-directors, the law forbidding them to act in the double capacity of buyers and sellers.

Michaud *v.* Girod, 4 How. 503.
Parker *v.* Nickerson, 112 Mass. 195.
Minot *v.* Middlesex Bk., 4 Met. 325.

But the law did not forbid them to *purchase* of their cestui que trust: it permitted it, "provided there was a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances"; if "no advantage was taken by concealment, misrepresentation, or omitting to state any important fact"; and if "all the knowledge acquired in the character of trustees" was disclosed.

1 Story, Eq. Jur., Sect. 321.
Long on Sales (2d Am. ed.), 435.
Brown *v.* Cowell, 116 Mass. 461.

It is submitted that our interpretation of the nature of the sale averred in the answer is the interpretation most favorable to the appellees, and the only one consistent with the relation in which the alleged purchasers stood to the appellant.

B. That the *origin* of this negotiation was *the proposition* of *the three directors to buy*, and not the proposition of the appellees to sell to them, is placed beyond dispute by the testimony of the president and the three directors themselves.

Demerritt, dep., Record, p. 85.

"*Int.* 22. Will you state whether, as a matter of fact, there was a proposition to buy on the part of the three said directors, and if so, whether it was first made by them or suggested by you?

"*Ans.* It was suggested by some one of them, Mr. White, I think."

White, dep., Record, p. 70.

"*Cross-Int.* 34. From whom did the proposition to sell or buy come, — the purchasers or Mr. Demerritt?

"*Ans.* From the purchasers."

Goodwin, dep., Record, p. 73.

"*Int.* 6. Will you state, as near as you can, *when the first proposition was made by you, Mr. Robinson, and Mr. White, to buy* the 450 shares of Hecla Mining Stock, pledged by Mr. Hayward to the bank?

"*Ans.* On the 7th of September, 1868, as near as I remember." Goodwin Rec 76 Ans 7 // Robinson Rec 21 Ans 4 67
" " 74 Ans 10 // " " 80 " 3
" " 78 " 33 // White " 129 " 2

C. It is also conclusively proved by the evidence of the same witnesses that the *terms and conditions* of the proposition and of the contract, if any contract was entered into, were that the appellant's *entire indebtedness* was to be paid."

Robinson, dep., Record, p. ~~123~~ 81

"*Cross-Int.* 7. Was there a sum fixed in the discussions of the 7th of September at which the stock was to be taken, or was it to be taken for the amount of the loan, and the assessments upon it, and interest?

"*Ans.* It was understood that we were to take it for the amount of the loan, assessments and interest; but it was also

understood that that amount would be two or three or four dollars a share less than we finally paid for it."

Goodwin, dep., Record, p. ~~11~~ 73

"*Int.* 9. Will you state what occurred, then, in regard to any sale of it, between the directors?

"[*Objected to.*]

"*Ans.* The directors then, those three, agreed to buy the stock at a price which would pay Mr. Hayward's loan, including interest and assessments on it. I wish to state here that my share was in connection with Mr. J. G. Weld."

White, dep., Record, p. 129.

"*Int.* 3. Did you at the same time that Demerritt made this remark, or at any time, make any, and if any, what remark, about what you would do?

"*Ans.* I stated before this that I would be one of one, two, or three that would take the stock at a price that would cover the Hayward loan, interest and assessments. Mr. Robinson and Mr. Goodwin each concluded to take a third, and I took the other third."

Demeritt, dep., Record, p. ~~133~~ 87

"*Cross-Int.* 17. Will you state what you said to him when you first went in, — as nearly as you can the language you used?

"*Ans.* I think I told him I thought I could sell his Hecla stock.

"*Cross-Int.* 18. Did you name any sum, or only refer to the indebtedness before him?

"*Ans.* I didn't name any sum, because I told him enough to pay the indebtedness."

D. It is true the appellees seek to derive help for their case from the fact of the "said power and authority in writing," of Nov. 9, 1867, "not being meanwhile revoked, but remaining in full force, as the answer avers."

Record, p. 9.

No doubt, if the negotiation set on foot by the proposition of the three directors — to buy at private sale, and on the terms and conditions averred — had fallen through, the appellees would have had the right to resume their purpose of selling adversely under said written power; but there is no averment or pretence that it did fall through, or that appellees ever resumed their purpose of selling adversely.

On the contrary, they have in substance averred that the negotiation resulted in a contract or arrangement, concurred in by the three parties interested; and that the "*purpose*" of the appellees, in the transactions of Sept. 8, 1868, was to carry out thatc ontract or arrangement, and that "it was *supposed at the time*" "*that this was done*."

Indeed, upon the answer and evidence, it may be said that the purpose of a sale under the written power had been, on the 7th September, *abandoned*, for the time being.

They assert that the proposition of the three directors to purchase was first made Sept. 7.

Goodwin, dep., Record, p. 73.

"*Ans.* 6. On the 7th of September, 1868, as near as I remember."

Robinson, dep., Record, p. 80.

"*Ans.* 3 (in part). I think this conversation took place the 7th September, 1868."

They had, after the vote of Aug. 17, discussed whether to sell at auction or not, and had found objections, they say, to so doing.

Robinson, dep., Record, p. 80.

"*Int.* and *Ans.* 3 (in part). After the passage of that recorded vote it was reported by Mr. Demerritt to the bank that he would have to sell the stock. He thought this stock would bring nearly enough to pay the loan, or quite; that Mr. Hayward could not in any way raise the money that vote required. *It was then discussed whether it would be well to try to*

sell it at auction. It was contended that so large an amount put into the market at one time would reduce the price."

See also Goodwin, dep., Record, 75, ans. 26.

A sale at auction was the only rightful mode of selling under that power, and a decision against an auction sale at that time would be a decision not to sell under their power of sale at that time.

Washburn *v.* Pond, 2 All. 474.

The *discretion* given to them in the written power is not to be construed as a discretion to sell at public or private sale at their will.

They rightly interpreted it as a limited discretion, as their answer shows.

Answer, Record, p. 9.

"The defendants say it was not thought best, at the time of giving said power in writing, to proceed and sell at once, as it would result in too great a loss; that it was thought best to wait a more favorable time, they hoping the stock or the affairs of said complainant would take a favorable turn; that in the discretion allowed defendants the loans were allowed to lie, and the stock was not sold until the time aforesaid, the said power and authority in writing not being meanwhile revoked, but remaining in full force; that finally, after waiting in vain for so long a time for the said stock to increase in value, they, in exercise of their discretion, concluded to sell, unless said complainant would pay the loans, or some part thereof."

And we submit that the written power of Nov. 9, 1867, is invoked by the appellees to no purpose; that it was superseded or at least suspended by the contract entered into (embracing the *special* authority to transfer to the three directors only on certain terms and conditions), and is wholly immaterial in this controversy.

Story on Bailments, § 317 (2d ed.).

In the treatise referred to, the author says: "In speaking of sales by the pledgee, it has been assumed that there is no special agreement among the parties as to the time and mode of sale. If any such agreement between the parties exists, it must regulate the rights of both parties, and neither of them will be allowed to depart from it with impunity."

E. Although the appellant had pledged his stock, his relation to it was still that of *general owner;* and it was competent for him to sell it at any time and to any party subject to the pledge.

It is "well settled that when personal property is under pledge or lien, whether created by operation of law or act of the owner, the general property remains in the owner, and he may transfer, subject only to the lien."

It is also well settled that where the pledge is of stocks and the transfer to the pledgee is absolute in form, the transaction is still a mere pledge, and the pledgor remains the general owner as between the parties and third persons having notice.

Whittaker *v.* Sumner, 20 Pick. 399.
Walker *v.* Staples, 5 All. 34.
Hazard *v.* Loring. 10 Cush. 26.
Baker *v.* Arnot, 67 N. Y. 448.
Edwards on Bailments. 257.
Merchants Bank v Kay 10 Allen 305

If a contract to sell to the three directors, such as is averred in the answer, had been entered into, yet, so long as that contract remained executory, the appellant could have sold to any other party, subject to the pledge, and such other party, on the payment of the amount for which the appellees held it as collateral, could have enforced the transfer of the stock. The appellant would only have subjected himself to an action for breach of his executory contract.

F. It would seem to follow that, if the contract of sale averred was entered into, the appellant's relation to that contract was the relation of vendor; that of the three directors, vendees;

and that of the appellees, bailees, having possession of the stock, or rather the record title, and authorized and agreeing by the contract to transfer it only on the performance of the conditions of purchase, and also agreeing, thereupon, to discharge the appellant from his indebtedness; the vendees being at the same time responsible, equally with their co-directors, for the performance by the appellees of their obligations as bailees under the contract.

II PROPOSITION.

If appellant's first proposition under this head is correct, it is further submitted that all the *equitable circumstances*, the statement of which so crowds the answer, tending to show the extent of the forbearance of appellees towards the appellant, — their then crippled but formerly prosperous customer, — disappear from the case. They might have a bearing were they seeking to sustain an *adverse* sale, but are immaterial upon any issue respecting such a sale as they aver.

If they have chosen to bargain with the pledgor for purposes of their own, their relations become precisely those of ordinary contracting parties to each other. The contract they have made determines those relations and their rights. The appellant, however, as we have already seen, derives from their previously existing relations the right to clear and distinct proof of the fairness of the contract, and of the sale, they seek to enforce against him, *beyond that* required in cases not affected by trust relations.

III PROPOSITION.

In case of such a contract of sale or purchase as we thus find set up in the defence, the payment of the agreed price (whether to be made in cash or by note) is a *condition precedent*. The *presumption* is that the delivery or transfer on the one side and the payment of the price on the other were intended to be *concurrent acts*, in the absence of any stipulation for credit or other stipulation tending to show that they were to be performed at different times.

A. "When different times are not expressly appointed for

payment and delivery, the acts of payment and delivery are concurrent, and constitute mutual conditions to be performed at the same time."

2 Add. on Cont. (3d Am. fr. 7th Lon. ed.), 152.
2 Kent Com. (12th ed.); old paging, 496, 497, 498; new do., 689, 690.
Hill *v.* Freeman, 3 Cush. 257.
Tyler *v.* Freeman, *ib.* 261.
Coggill *et al. v.* H. & N. H. R. R., 3 Gray, 545.
Hinchman *v.* Cunney 98 Mass 149

B. Such a condition "must be strictly performed in every particular." Nor does it matter that it is "difficult or foolish" provided it be not "impossible, or illegal, or repugnant at the time the contract is made, or become so afterwards"; "for if it be so it is the fault of the party who engages to perform it, and he should suffer the consequences."

1 Story on Cont. (4th ed.) § 32; (5th ed.) § 47.
Gray *v.* Blanchard, 8 Pick. 284.

C. The distinction that exists between the sale and delivery of property upon condition precedent, and a sale and delivery procured by fraud or false representations on the part of the vendee, is stated in —

Coghill *v.* Hartford & N. H. R. R. *ub sup.*

"In the latter case," says the Court, "the property passes by the sale and delivery, because such was the agreement and intention of the parties"; "but, in the case of a conditional sale and delivery, the title does not pass from the vendor until the condition is fulfilled."

D. The effect of such a condition precedent in a contract of sale is that there is no sale, and no completed contract of sale, binding on the party in whose favor the condition is, until the condition is performed or waived.

1 Story on Cont. (5th ed.) § 45; (4th ed.) § 30.
" (5th ed.) § 39; (4th ed.) § 26.
Brown on Sales, Ch. 1, Sect. 1, Cl. 41.
2 Kent Com. (12th ed.) *ub sup.*

E. It is true, if *delivery* of the thing sold is made voluntarily, by the vendor, or the party whose title is to pass if the conditions of the contract are fulfilled, without exacting performance at the time, or without simultaneously with the delivery affirming the condition, a presumption may arise that the condition is intended to be waived.

But such presumption may always be rebutted.

2 Kent (12th ed.) *ub sup.*
Whitwell *v.* Vincent, 4 Pick. 449.
Dresser Man. Co. *v.* Waterston, 3 Met. 9.

In this case, the fact, admitted in the answer, that the appellees and the three directors (who are exclusively responsible for the transactions of Sept. 8, 1868, and for the mistake that affected those transactions) *supposed* that the conditions — both those obligatory upon the appellees and those obligatory upon the alleged purchasers — *had* been complied with, overcomes, or rather *excludes* any such presumption.

"In making said sale the *purpose* and proposition was to sell the stock at a price which would cover the said indebtedness entirely, and *it was supposed at the time*, according to the figures of a clerk in making up the account, that this was done; and the borrowed and received memorandums, which the defendants still held, were given to the president of the bank, John Demerritt, *to be delivered to*" appellant; "*but*," etc.

Ans., Record, p. 8.

It is not pretended that the appellant participated, or was asked to participate, in the transactions of Sept. 8, they were exclusively among the directors themselves; but, assuming, for the argument, that such a contract of sale as is averred was entered into, the account (Ex. 21, Record, p. 166) which was sent to him Sept. 8 was a representation to him that the condition in respect to the payment of the agreed price *had been performed*.

II.

THE DEFENCE CONSIDERED WITH REFERENCE TO THE EVIDENCE.

I PROPOSITION.

To maintain the defence, then, set up in their answer, the appellees have the burden of proving, —

First. That the contract of sale or purchase they have averred was entered into by the parties stated to have concurred in it, viz., the appellants, the appellees, and the three directors.

Second. That the terms and conditions of that contract, by which the three directors were to pay for the appellant's stock, the *entire amount* of the *indebtedness* for which it was pledged, and the appellant was to be discharged therefrom, were duly performed.

Third. Or, if said terms and conditions were not performed, that they were waived by the appellant, or some substituted performance accepted by him.

And this burden is that especial burden that lies on trustees for sale when they seek to maintain an avowed purchase of the trust property from their cestui que trust.

II PROPOSITION.

A. But the answer, as we have seen, *admits* that the terms and conditions of the contract were not performed; that the transactions of Sept. 8, 1868, in *intended* performance of them, were affected by a *mistake* (that was exclusively the fault of the appellees), by reason of which mistake the entire amount of the appellant's indebtedness was *not* fully paid by the alleged purchasers, and had not been when the answer was filed; and because it was not fully paid, that the appellees did not discharge the appellant, and had not discharged him when the bill was filed, but continued to claim a balance of his indebtedness as still outstanding and due from him.

B. And it will appear by the evidence, as will be hereafter shown, that on the discovery of the fact by the three directors,

that they had not complied with the terms and conditions of the contract on their part, they refused or wilfully neglected to make further payment, and denied their obligations to do so.

C. It becomes essential to the case of the appellees, therefore, to aver *ratification* of the transactions of Sept. 8, in some form, with knowledge of the facts that followed, upon the discovery of the mistake affecting those transactions.

And we find, accordingly, averments of ratification distributed through the answer, intended to serve that purpose.

D. It may justly be inferred, too, that those averments were intended to serve a further purpose.

Although the answer does not disclose the fact, it is shown beyond dispute in the testimony, that the $39,257.16, paid Sept. 8, 1868, by the three directors, was not paid in cash, but in their respective notes, for $13,085.72 each, on six months.

Record, 156, Ex. 1.

E. And it appears by the voluntary deposition of Mr. Ranney, the solicitor who prepared the answer, that before he called him as a witness, Mr. Demerritt, the president, conversed with him "about what he said to the directors, in reference *to taking the stock back at the time of the sale.*"

Record, 130; Ranney, dep.

And the proof will be found very strong, as we believe, although there is a conflict among the witnesses for the apellees, that there was an understanding between the appellees and the three directors that *the bank would "take the stock back"* at the end of the six months of credit, if either of the alleged purchasers desired, or that they "might, within six months, *return it.*"

Demerritt, dep., Record, 103, ans. 145.
Goodwin, dep., Record, 78, ans. 33.

All the three directors admit that Demerritt said he would "take the stock off their hands"; and although they further

say they did not consider it binding on him, yet Goodwin thought so much of it that he admits *he reported it to his partner*, who had the privilege of taking half his share, as he says, and who indorsed his note.

Goodwin, dep., Record, 79, cross-ans. 38.
Robinson " " 80 ans 3
White " " 119 " 2

III PROPOSITION.

It is important now to state more fully than the answer discloses, the nature of the mistake that affected the transactions of Sept. 8, 1868, and the proceeding of appellees thereupon.

A. After the receipt of the notes of the three directors, and the transfer of the stock by the president (the cashier being absent) from the name of the cashier, in which it stood, into the names of the three directors, *Exhibit* 21 was sent to the appellant, but no other report or statement of any kind was made to him, written or oral.

Exhibit 21, Record, p. 166.

C. L. HAYWARD, *in account with*
THE ELIOT NATIONAL BANK, BOSTON.

Dr.

Oct. 19, 1866.	Borrowed and rec'd . . .	$20,800 00
	Int. paid to April 1, 1867.	
Oct. 17, 1866.	Borrowed and rec'd . . .	6,500 00
	Int. p'd to April 1, 1867	
July 23, 1867.	Assessment on Hecla, 450 shares	2,253 00
Aug. 9, 1867.	" " " " .	1,379 03
Oct. 11, 1867.	" " " " .	2,250 00
Dec. 26, 1967.	" " " " .	2,263 12
April 24, 1868.	" " " " .	1,827 00
	Int. on 26,500 to Sept. 6 . .	2,283 41
	" " assessments . .	501 60
		$39,257 16

Cr.

Sept. 8, 1868.	By cash	$39,257 16

The appellant, however, testifies that the person who brought to his office that paper, "stated the stock had been sold," — nothing more.

Hayward, dep., Record, p. 56, cross-ans. 117.

B. It was subsequently found, — on the return of the cashier, who was ill and absent from the bank for several days, including the 7th and 8th of September, — that the sum of $464.16 of interest, which should have been charged in the appellant's account on Sept. 8th, had been omitted therefrom. It was also found that a sum of $375.03 belonging to him was in the hands of the bank, derived from the sale, on the *3d of September*, 1867, of $4,000 U. S. *bonds* pledged to the bank for a loan prior in date to the Hecla loans, that sum being the surplus of the proceeds of sale beyond the debt for which those bonds were pledged.

Thereupon, as it further appears, the account of the appellant was *restated* on the books of the bank; the $464.16 was charged, and the $375.03, with interest from Sept. 3, 1867, was credited, and resulted in a balance of $62.52. This is the balance of "*about* $60" referred to in the answer, Record, p. 8.

This *restated account* is put in by the appellees.

Ex. 10, Record, p. 159 (Conant, dep., pp. 38, 39), and cross-int. and ans. 40.

Ex. 23, *ib.* p. 169 (*ib.* p. 149), int. and ans. 63.

C. The appellant denies that the appellees had any right to appropriate the $375.03 to reduce the balance of $464.16 to $62.52. The only authority the appellees had to deal with it at all appears in —

Ex. 9, Record, p. 159.

The president and cashier *assumed* without conference with, or notice to appellant, to "understand" Ex. 9 as pleased them.

Conant, dep., Record, p. 138, cross-int. and ans. 10 to 13.

Conant, dep., Record, p. 138, cross-int. and ans. 14 to 21.

D. But whether this balance of outstanding indebtedness be correctly computed at the larger or at the smaller sum, the appellant's account was re-stated, as aforesaid, on the books of the bank, and has so stood from that day to this.

Conant, dep., Record, 149 (int. by appellees).

"*Int.* 62. After that suit was brought and before the answer was sworn to by you and filed in this case, did you or not give me a paper showing how that balance arose and what the error was in the account as made up and given to Hayward, Sept. 8, 1868?

"*Ans.* I gave you a copy of the account.

"*Int.* 63. Will you look at the paper now produced marked 'Exhibit 29,' and see whether that is or is not the paper referred to which you gave me?

[*Same objection.*]

"*Ans.* Yes, sir, it is."

Conant, dep., Record 155 (cross-int. by appellant).

"*Cross-Int.* 136. Please look at Exhibit No. 10, and say if that is a copy from your books, or is an abstract or aggregate from your books?

"*Ans.* This is a copy made from our books and papers in the bank.

"*Cross-Int.* 137. Is every entry on that found in words and figures upon your books?

"*Ans.* Not the heading, certainly. In substance, yes.

"*Cross-Int.* 138. I ask if that is a copy, in words and figures, from your book, or is it an abstract or aggregate from your books. I don't ask if it is in substance a copy, but is it in words and figures a copy?

"*Ans.* In figures, yes.

"*Cross-Int.* 139. Will you be kind enough to find on your books the figures entered on that exhibit, Sept. 8, 1868, $464.16?

"*Ans.* My books of this date are not here. They were not called for.

"*Cross-Int.* 140. Is there any such intem on your books?

"*Ans.* I can answer by reference to books.

"*Cross-Int.* 141. Why do you say that is a copy from your books, if you are not able to say whether those figures appear on your books?

"*Ans.* I am satisfied the item appears in the books or papers of the bank. The book-keeper made it as a copy, and I believe it to be so.

"*Cross-Int.* 142. Have you ever compared it to know whether it is a copy or not?

"*Ans.* I think I have."

E. Upon the discovery of this mistake and this restatement of the account, the purchasing directors *denied their obligation*, under "*the terms and conditions of purchase*," as they expressed it, to pay the balance still remaining due, according to the restated account, and refused or wilfully neglected further performance.

Robinson, dep., Record, p. 24.

"*Int.* and *Ans.* 56 (in part). It was afterwards found that that did not quite some sixty or seventy dollars, more or less, it lacked of paying Mr. Hayward's indebtedness; but *we having completed the purchase, the stock having been transferred and settled for according to the terms and conditions of purchase*, the bank *had no claim on us* for the farther amount."

Goodwin, dep., Record, p. 74 (int. by appellees).

"*Int.* 21. Did you know anything about a supplementary statement or a question about a balance still due from Mr. Hayward — some sixty odd dollars — after the sale had been made?

"*Ans.* I did.

"*Int.* 22. What did you know of it?

Ans. The account to which the proceeds of the sale of stock were applied was made, reckoning interest at six per cent. Mr. Hayward had an understanding that he should pay seven per cent. *That difference between six and seven per cent*

was charged to him. There was, at the same time, to his credit, the proceeds of some other sales of bonds, I think, leaving a balance of sixty or seventy dollars due the bank."

This took place a few days after the transactions of Sept. 8, 1868.

Robinson, dep., Record, p. 24.

"*Int.* 57 (*de bene not waiving objection*). When did you first hear of the sixty or seventy dollars above alluded to?

"*Ans.* Within a few days; perhaps the next day following the purchase."

See, too, Conant, dep., Record, p. 38; int. and ans. 102–104.

F. Upon the refusal of the alleged purchasers to pay the balance remaining unpaid, the bank *withheld the notes* given by the appellant for the loans, to enforce the payment of the balance, making *no indorsement*, even, upon the notes given for the loans, of any payment thereon, as of Sept. 8, 1868, or afterwards.

Answer, Record, p. 8.

Conant, dep., Record, p. 149 (int. by appellees).

"*Int.* 70. Did you, as cashier, or any other officer of the bank to your knowledge, ever hold or claim any rights to hold said memorandum notes or checks after the sale and delivery of the stock *any further than to have the said balance of* $62.52 *paid?*

"*Ans.* No, sir."

Copies of the notes (appellees stating that they have lost the originals) were put in by the appellees, and show no such indorsement.

Record, pp. 168–9, Ex. 26 and 27.

Conant, dep., Record, p. 148.

"*Int.* 50. Will you state whether you have made search for the original memoranda or memorandum checks given by Mr

Hayward for the Hecla loan, and if so, whether you have been able to find them?

"*Ans.* I have looked these papers over in my custody, and searched for these original notes, and am unable to find them.

"*Int.* 51. State whether, after this bill was brought, you made and gave me copies of them.

"*Ans.* I did make copies of them. I don't know when.

"*Int.* 52. Did you give or send those copies to me?

"*Ans.* I think I sent them, but am not certain."

IV PROPOSITION.

A. We pause here a moment to ask: What rights, in any Court, can a party to an *executory* contract found upon that contract, after he has wilfully repudiated his obligations under it, without excuse, and without the shadow of an equity to aid him?

We know of none, unless in cases where the repudiation precedes the time fixed for performance, when, perhaps, there may be a *locus poenitentiae* until the time for performance arrives, unless the other party has acted upon such repudiation.

But such repudiation, if made at the time when performance is due, is absolute and final.

Daniels *v.* Newton, 114 Mass. 530, 533.
Nason *v.* Holt, *ib.* 541, *n.*

B. Or, looking at the case at bar in its most simple aspect, if on the 7th of Sept. 1868, the appellant was the general and legal owner of the stock, and the appellees solicited and obtained his "*concurrence*" in an arrangement they desired to carry out, — to sell his stock to three of their directors on certain terms and conditions, — and his *authority* to transfer it to them on their performance of these conditions.

And if the appellees and the supposed purchasers "concurred" in this arrangement, and profess to have acted under it in the transactions of Sept. 8, but failed to comply with its terms and conditions, by a mistake for which they were alone

responsible, and when the mistake was discovered, took no action to relieve themselves from the position in which their failure to comply placed them, but wilfully neglected further performance, and repudiated their obligations to make further performance, can they now come into Court, disclosing, for the first time, their non-performance, and, persisting in their refusal and repudiation of their obligations further to perform, defeat the appellant's right to redeem?

Can there be a doubt he would have had that right,— had he been able and pleased to exercise it, — if they had *promptly* disclosed the facts?

And can he have lost it solely by their neglect so to disclose them?

C. The appellees may well answer that they take no such absurd ground, but rely upon their averments of ratification "with full knowledge of the facts."

V PROPOSITION (RATIFICATION).

We have thus reached the stage of our discussion, when this main question of fact may appropriately be considered.

We call it the main question of fact, since, if we are right in assuming (as the appellees have assumed in framing their answer) that their case rendered it necessary for them to aver, and renders it necessary for them to prove, ratification in some form, *it follows* that the determination of that question may determine the whole case; for, if determined against the appellees, their defence must fail, even if their averment of the appellant's concurrence in the contract of sale or arrangement of Sept. 7 is proved.

As the determination of this single question may be so decisive, we feel at liberty to ask the most careful attention of the Court to its consideration.

A. An averment of ratification with knowledge of the facts (that is, all the facts making ratification neces-ary) fails of proof in the absence of evidence of such knowledge, equally as in the absence of evidence of ratification; and is as effectually

disproved by proof that the party had no knowledge of the facts as by proof that he did not ratify.

Combs *v.* Scott, 12 All. 493.
Parker *v.* Nickerson, 112 Mass. 195–197.
Mulford *v.* Murch, 3 Stockton. 16

In the last case cited the Court say, "No act will be held as an act of ratification by a Court of Equity unless it was done with knowledge of his legal and equitable rights."

B. The principal facts that make ratification necessary are the discovery by the appellees of the mistake that affected the transactions of Sept. 8, 1868, and the acts or proceedings of the appellees and the alleged purchases thereupon.

They have already been sufficiently pointed out in Proposition III, under second head of our brief (*ante*, p. 19).

C. These facts were exclusively in the knowledge of the appellees and their officers. They were facts they were bound to communicate.

2 Perry on Tr., § 850.
2 Story Eq., § 1275.

The appellant had no means of knowledge otherwise. No other fact was known to him "to put him on inquiry." On the contrary, Exhibit 21, sent to him Sept. 8, was a representation, or rather a misrepresentation, that put him off from inquiry.

D. Now it seems to the counsel for the appellant, after giving their best attention to the testimony upon this question, and to the opinion rendered by the learned Justice of this Court who heard the cause in the Circuit Court, for whom they need not say they entertain the most sincere respect, that so far from being sustained by the proofs, there is absolutely *no competent testimony whatever* in the record in support of any form of ratification; either by waiver, acceptance of a substituted performance, or otherwise: no *act*, no *word*.

And this is equally true whether the testimony is considered

with reference to ratification itself, or to the appellant's knowledge of the facts (that is, all the facts making ratification necessary).

It will certainly strike this Court as extraordinary that in a transaction of this magnitude, — a national bank in the city of Boston being the responsible actors, — and the nature of the transaction being an avowed purchase by trustees for sale of the trust property, by a bargain with their *cestui que trust*, that they produce *no evidence* in *writing*, and do not pretend that any such evidence ever existed, tending to support either their averments of ratification, or their averment of the original contract, in pursuance of which they claim that the purchase was made.

Nothing upon the records of the bank or its directors tending to show that any such contract was ever made, authorized, ratified or voted upon. No letter written to or received from the appellant. Nothing, in fine, to show that anybody (other than the president and the alleged purchasers) participated in or had knowledge of the transactions of Sept. 8, either before or after that date.

Conant, dep., Record, p. 27; int. and ans. 12 to 23.
Ib. " 29; " " 47 to 50.
Ib. " 30; " " 57 to 58.
Ib. " 31; " " 63 to 67.
Ib. " 32; " " 79 to 80.
Ib. " 42; " " 152 to 157.

E. If the rule in equity (already referred to) that requires a trustee for sale, if he would maintain an avowed purchase of the trust property from his *cestui que trust*, to show "a clear and distinct contract," is not a mockery, the absence of all record or written evidence ought, of itself, to render the purchase averred in this case incapable of proof, especially when it is con-idered that the absence of all such evidence is without any explanation, and would seem *incapable* of explanation.

If the averments in the answer that the appellant gave his prior "assent" and "full concurrence" to the bargain, and

"requested that it might be made," and subsequently ratified it with "full knowledge of the facts," are true, how readily he would have expressed himself to that effect *under his hand* if asked, and how natural that the appellees should have asked him to do so.

F. Deferring for the present the consideration of the probative effect of the answer, and confining ourselves to the testimony, it will be found that there is *no testimony whatever* that any of the facts rendering ratification necessary were ever made known to the appellant, by written or verbal statement, directly or indirectly.

Demerritt and Conant, testifying, admit that they never communicated to him the *restated account*, or any particular of it, and in effect that they gave him no information of anything after Sept. 8. The three alleged purchasers testify to the same effect. The appellant himself denies any information or knowledge except what he obtained from *Exhibit* 21, until the facts were disclosed in the answer.

Demerritt, dep., Record, p. 92 (int. by appellant).

"*Cross-Int.* 76. Were you acting as president of the bank in all your transactions relative to that stock and the sale of it?

"[*Objected to.*]

"*Ans.* I thought I was.

"*Cross-Int.* 77. Did you say to him that you had an offer from these named gentlemen to buy that stock, or that you thought you could sell it to them?

"*Ans.* I told him that I thought I could sell it to them. I think that was the word I used.

"*Cross-Int.* 78. After reporting at the bank that interview, did you again return to Mr. Hayward and report to him what those gentlemen said and did?

"*Ans.* I don't think I did."

Demerritt, Record, p. 107 (int. by appellees).

"*Int.* 191. If on Sept. 8, 1868, when the amount of Mr. Hayward's indebtedness was made up, there was a surplus

growing out of the sale of the government bonds which hadn't been credited to Mr. Hayward, and which did not enter into the account which has been shown you, 'Exhibit 21,' that excess or surplus was still due him, was it not?

"[*Objected to.*]

"*Ans.* It would be according to the way the account is made up.

"*Int.* 192. Do you say that that matter was or was not discovered, and the matter adjusted with Mr. Hayward, then, after that sale had been made and the account rendered?

"[*Objected to.*]

"*Ans.* Not to my knowledge."

Demerritt, dep., Record, p. 114 (int. by appellant).

"*Cross-Int.* 116. Referring to the subject of a surplus derived from the sale of U. S. bonds, amounting to $375.03, did you at any time after Sept. 3, 1867, when the bonds were sold, speak to Mr. Hayward about that sum of $375.03?

"*Ans.* No, sir, I never did.

"*Cross-Int.* 117. Did you ever receive from Mr. Conant an account or memorandum containing a calculation or statement of the difference between the interest at six and seven per cent on the Hecla loan, and an item of $375.03, showing a difference of between sixty and seventy odd dollars, purporting to be due from Mr. Hayward to the bank?

"*Ans.* I never received the statement. He said to me that that was the case: that is my recollection.

"*Cross-Int.* 118. Did you ever make any explanation to Mr. Hayward, after the pretended sale of the stock on the 8th of September, of such a difference (sixty or seventy dollars), associating it with the item of $375?

"*Ans.* I don't think I did.

"*Cross-Int.* 119. Did you ever, after Sept. 8, 1863, speak to Mr. Hayward about a balance due from him to the bank on the Hecla loan?

"*Ans.* I have said so before, and I thought so; but when I come to look it was utterly impossible. I did not speak to him

about it after that date. I don't mean that I said so here, but that I said it after the suit was begun.

"*Cross-Int.* 120. If you ever spoke to Mr. Hayward about the payment of a difference arising from casting the interest at six or seven per cent, had it or not reference to the interest due upon the Hecla loan on the first of April, 1867?

"*Ans.* I think I stated so once, and I now repeat it.

"*Cross-Int.* 121. Have you any reason to believe that Hayward knew anything about the balance of $375.03?

"*Ans.* I don't know, sir."

Demerritt, dep., Record, p. 115.

"*Cross-Int.* 132. Did you see Mr. Hayward upon the subject of that purchase after the time when you told him you thought you could sell it?

"I have no recollection of seeing him.

"*Cross-Int.* 133. You never reported to him, then, what the transaction was between you and the three directors?

"I don't think I saw him."

Demerritt, dep., Record, p. 118 (int. by appellees).

"*Int.* 302. What have you seen which enables you to state the fact now differently from what you stated when you say you stated it and thought differently after the suit was brought? Please note the question and answer it specifically, and don't go beyond it. [*Refers to answer to Cross-Int.* 119, *supra.*]

"[*Objected to as assuming that the witness has answered what he has not answered.*]

"*Ans.* I didn't want to see Mr. Hayward until the six months had expired. I kept out of his way. I didn't keep out of his way; I didn't want to see him. I had no motive in seeing him.

"[*Answer objected to as irresponsive.*]"

Conant, dep., Record, p. 134.

"*Int.* 16. In whose favor was the balance of $62.52?

"*Ans.* Balance due the bank from Mr. Hayward.

"*Int.* 17. What did you do about that balance, or collecting it, or having it collected, if anything?

"*Ans.* I did not do anything further than to refer it to Mr. Demerritt, who had the handling of it.

"*Int.* 18. State whether you did or did not communicate the facts to him, or give him a statement of it.

"*Ans.* *Not to Mr. Hayward*, but Mr. Demerritt."

See further,—

Conant, dep., Record, p. 134; ans. 20–25.
Ib. " " p. 35; cross-ans. 29–31. (Int. by appellees.)
Ib. " " p. 32; ans. 75–77.

Goodwin "never spoke to him."

Record, p. 73; ans. 7.

White did "not know" him.

Record, p. 70; cross-ans. 37.

Robinson had a "speaking acquaintance" with him, but does not pretend to have ever exchanged with him a word about the sale.

Record, p. 24; ans. 50.
Ib., p. 18; ans. 4.

The appellant positively *denies* any information or knowledge.

Hayward, dep., Record, p. 48–50; int. and ans. 5–31.
Ib. " " p. 63; int. and ans. 34.
Ib. " " p. 57; cross-int. and ans. 133.

G. It would seem unnecessary to go further to show that *ratification* is not proved. Its very basis is destroyed by the testimony already referred to.

H. But there is one averment in the answer, of a particular incident, from which it was the purpose of the appellees to infer ratification, and on which, obviously, they mainly relied (and it is the only averment in respect to ratification that is not en-

tirely general in its character). We refer to the *interview and conversation* said to have been had by their president with the appellant, after the mistake affecting the transactions of Sept. 8 had been discovered by the directors, at which interview it is averred the president "stated" this mistake to appellant, and the latter "*admitted that it was so, and promised to pay that balance soon*," etc.

Ans., Record, p. 8.

That the *promise* here averred is a promise averred to have been made to their *president*, and to nobody else, is made clear by a succeeding averment, where, referring to appellant's written demand upon them of March 11, 1872, they aver that at that time appellant "had no just claim against them," . . "but that he, on the contrary, was bound to pay the *balance* set forth as aforesaid, as due from, and *promised* to be paid by him, *to their president*."

Ans., Record, p. 10.

I. The averment of this interview and conversation had by the president with the appellant appears, conclusively, from the voluntary deposition of Mr. Ranney, their solicitor, and the testimony of their president, to have been *introduced into the answer by mistake*.

The solicitor deriving his information solely from the president, and the latter swearing that such information *was wholly erroneous*, and explaining that he had in mind *another* conversation or conversations had with the appellant *the year previous*, about a balance of $60 or $70, that arose from a difference of interest, between six per cent, at which rate, he says, it had been charged on the appellant's *temporary loans*, up to *April 1st*, 1867, and six and one half per cent, which the appellant agreed with him to pay up to that date.

Ranney, dep., Rec. p. 130.

J. The examination of Demerritt in respect to the truth of the

averment in question began on the direct examination by Mr. Ranney.

Record, p. 85, Demeritt's dep.

"*Int.* 29. Will you state whether you had an interview with him in relation to a balance of money that still remained due in a difference of interest after the transfer of the stock had been made to the directors named?

"*Ans.* I don't think I saw Mr. Hayward immediately after that.

"*Int.* 30. If you had a talk with him in relation to his paying a balance of $60 or $70, being a difference of interest between six and seven per cent, state what he said about paying it?

"*Ans.* I had a talk, but when that was I can't fix the time. He didn't object to it when I talked with him.

"*Int.* 31. What did he say about paying it, if anything, or when he would pay it?

"*Ans.* Pay it when he could.

"*Int.* 32. Do you recollect what that sum was? State as near as you recollect.

"*Ans.* I think it was between $60 and $70.

"*Int.* 33. Do you recollect of what it was made up?

"*Ans.* I understood it was a matter of interest, a difference between six and seven per cent.

"*Int.* 34. Do you recollect who discovered the error or balance and gave it to you.

"*Ans.* I think it was Mr. Conant.

"*Int.* 35. Did you explain to Mr. Hayward at the time how it occurred?

"*Ans.* I told him it was the difference between six and seven per cent."

Obviously, the counsel for the defence was not very well satisfied with his witness. He stopped, having made but little progress towards proof of the averment.

The cross examination began as follows: —

Demeritt, dep., Record, p. 93.

"*Cross-Int.* 84. You have spoken in your examination-in-

chief of having some conversation with Mr. Hayward about a balance of some sixty or seventy dollars arising in the difference between six and seven per cent interest. When did you have any such conversation with him, if you ever had any?

"*Ans.* I think I had it several times.

"*Cross-Int.* 85. State once, as nearly as you can.

"*Ans.* I had it immediately after he paid the interest up to April.

"*Cross-Int.* 86. In April of what year?

"*Ans.* 1867."

If the counsel for the defence had cared to press the direct examination upon the point "*when*" the witness had any such conversation, he would doubtless have had this early intimamation that the conversation inquired of did *not* occur *after* Sept. 8, 1868, but long before.

The cross examination is continued from the answers quoted, to cross-int. and ans. 101.

Record, p. 93, 94; cross-int. and ans. 87–101.

And it is elicited — in answer to the question whether he "*ever spoke*" to appellant "about his account or any balance of his account after Sept. 8, 1868" — that he "might," but "*don't recollect it.*"

The direct examination was resumed on Record, p. 95; but the subject of the interview and conversation in relation to the balance of interest was not touched upon until we reach —

Record, p. 104, int. and ans. 161, when it is continued to page 108, int. and ans. 204, with the result, that the interviews and conversation to which the witness is testifying here took place *when* he went "to get the whole debt paid," which was of course before Sept. 8, 1868; that it had reference to a difference of interest which arose April 1, 1867, and not to one discovered after Sept. 8, 1868; that the witness "felt confident about it"; that its amount was *one half between* six and seven per cent, that is, one half per cent additional. And that the matter of the surplus growing out of the sale of the

government bonds ($375.03) "was not adjusted" with appellant "after the sale," "*not to his knowledge.*"

Record, p. 105, ans. 163.
106–7, ans. 186, 187.
105, ans. 169.
107, ans. 191, 192.

The remaining testimony of the president bearing upon this averment — still more conclusive than the foregoing — has been, in part, already quoted on pp. 29–30 of Brief, and will be found on —

Record, p. 114, cross-ints. and ans. 116–121.
115, cross-ints. and ans. 132–133.
118, int. and ans. 302.
119, ints. and ans. 307–317.

K. Thus we find the only *particular act* averred as evidence of ratification *disproved* by the witness the answer *refers* to in support of it.

1 Green. on Ev. 182 &c

But appellees seek to impeach the credit of their witness by testimony to the effect he had *formerly stated* the fact to be as averred in the answer; and it has been seen that he admits he had formerly so stated to Mr. Ranney, in preparing for the answer, and so thought at that time, but he fully explains this in his testimony.

It is a sufficient answer to this effort of the defence, and to all the testimony in the Record in regard to the president's former statements, that it is *no evidence whatever* that the fact is as he formerly stated it to be.

Gould *v.* Norfolk Lead Co., 9 Cush. 338.
Ryerson *v.* Abington, 102 Mass. 526.

L. We should leave this point without further discussion, but that the learned Judge in his opinion in the Court below, referring to Demeritt's testimony bearing upon the averment in

question, gives a brief summary of it, from which it might be inferred that the witness expressed himself as if he was in doubt whether the interview and conversation was prior or subsequent to Sept. 8, 1868, and whether it had reference to a difference in interest arising April 1, 1867, or to the difference that arose Sept. 8, 1868; and from which it might also be inferred, that the president did not even agree with the answer to the bill, and with the testimony of the cashier, as to the fact that a difference of interest *did* arise Sept. 8.

Whereas, we submit, the president's testimony, after he made up his mind to tell the whole truth, could not be more positive, or more free from any doubt whatever.

The summary of his testimony, in his Honor's opinion, might have been made from a fragment of the testimony drawn out by the counsel for the defence in the introductory part of the direct examination, when the witness was obviously reluctant, and the counsel cautious, for the most material averment in the answer (as we think) was at stake. But certainly the testimony of this witness was not to be left here. He was the president of the bank during the whole progress of the transaction, remained such long after the answer was filed, and had more to do with it and knew more about it than everybody else in the world.

To show that the president was at no variance with the appellees as to the fact that a difference of interest arose Sept. 8, 1868, we need only refer to the Record.

> Demeritt, Record, pp. 122–124, ans. and ints. 351–381.
> Record, p. 121, int. and ans. 339.

The witness is asked, "On the 8th of September, 1868, under your agreement with Mr. Hayward, what rate of interest did you understand he should pay?" and he answers, "Seven per cent."

He means that under his agreement made the year before, the appellant should have been *charged*, Sept. 8, 1868, seven per cent, as is made clear on

> Record, p. 124, cross-ints. and ans. 144, 145.

M. After the president had testified, the appellees examined the cashier, and, further to discredit the president, sought to prove that interest was computed to April 1, 1867, at *seven per cent*, and not at six, as the president swore; and to draw the inference that, therefore, there could not have been any difference of interest that arose April 1, 1867, to have a conversation about.

Now we believe we can show not merely to a moral certainty, but to a mathematical demonstration, that interest was cast up to April 1, 1867, at six per cent and not at seven, — that the president is right and the cashier wrong.

We ask more earnestly the attention of the Court, for the reason that his Honor in the Court below expressed a different opinion.

The president had testified as follows: —

Record, p. 111 (int. by appellees).

"*Int.* 230. Referring now to interrogatory 190, which was left to be answered, will you please have the same read to you again by the examiner, and answer the same?

"[*Question* 190 *read to witness.*] inquiring what amount was paid as interest April 1, 1867.

"*Ans.* I have.

"*Int.* 231. What do you find the rate of interest to have been reckoned at up to that date?

"*Ans.* I didn't figure it. I saw the amount.

"*Int.* 232. Do you or not find that the interest was reckoned and appears in the books of the bank to have been paid at the rate of 7 per cent on the loan of $26,500 made in October, '66?

"*Ans.* I don't think it was.

"*Int.* 233. What sum do you find there reckoned?

"*Ans.* I find the amout of interest, $837.66.

"*Int.* 234. Have you reckoned to see whether it is not reckoned at 7 per cent on the two loans made to Mr. Hayward in October, '66?

"*Ans.* *I have seen that that embraces three loans, I think.*

If Mr. Conant showed me his books correctly, I saw no other entries for interest along that time, and about that time."

Record, pp. 116, 117 (int. by appellees).

"*Int.* 273. Is it your recollection that the interest due to April 1, 1867, on said memorandums, was paid on or about April 1, 1867?

"*Ans.* The books show it, I saw the other day.

"*Int.* 274. What is your recollection as to the fact whether the interest was then paid at 6 per cent or 7?

"*Ans.* I think it was 6.

"*Int.* 275. Do you speak from recollection or from reasoning?

"*Ans.* From both.

"*Int.* 276. What fact about it do you remember?

"*Ans.* I talked with Mr. Conant. I think he had made it 6; I thought it ought to be 7."

On the other hand, the cashier, in his subsequent examination, testified in effect, that interest was cast to April 1, 1867, at seven per cent, and that the amount paid ($837.66) was interest on the *two Hecla loans* of $6,500 from Oct. 17, 1866, and $20,000 from Oct. 19, 1866; in other words, that it did not "embrace *three* loans," as the president had testified in answer to *Int.* 234, *Record*, *p.* 111.

Conant, Record, p. 133, ints. and ans. 2 to 8.

Now the appellant had a third "temporary loan" in the bank April 1, 1867, of $4,000 on pledge of United States government bonds. The answer says it was a "*prior loan*" to the Hecla loan, and the president says, "It was before the large indebtedness."

Answer, p. 6.
Demeritt, Rec. p. ~~137~~. 113 & int. Trans. 137

not doubted he could give the "exact date" of it by reference to his books.

Conant. Record, p. 35, cross-int. 27
Ib., Record, p. 38, int. 109.
Ib., Record, p. 133, int. 8.

But in his second deposition, after this issue had arisen between him and the president, and after examining his books, says he "cannot fix definitely" its date. He admits, however, that there was this third loan among the temporary loans *April* 1, 1867, and that he had a credit of that amount, *Aug.* 29, 1866, which "may or may not be," that loan.

Conant, dep., Record, 141, cross-ints. and ans. 52–54.
Ib., dep., Record, 142, cross-ints. and ans. 60, 61.

X. Now the precise question between these two principal witnesses for the appellees is just this; was the $837.66 paid by appellant as interest April 1, 1867, interest at seven per cent on the two Hecla loans only, or was it six per cent on his *three "temporary loans"* in the bank at that date.

It is hardly more than a question of figures.

It appears that the bank was in the habit every six months, a few days before dividend days (April 1 and Oct. 1), of computing the interest up to that date on all their temporary loans, and entering it as cash in their book of daily balances.

The amount of interest in question, $837.66, was so entered, under date of March 27, 1867, and a copy is produced of a page from that book, containing the entry.

Record, p. 140, cross-int. and ans. 40.
Record, p. 170, Ex. 32.

Conant admits that "*naturally*," but "not necessarily" interest on the $4,000 loan "would be entered and included in this item of $837.66."

Record, p. 141, cross-ints. and ans. 50, 51.

He nowhere accounts for its not being so entered.

It was a loan in the bank on which interest had accrued, and

if not included in this sum of $837.66 it was not entered or charged at all.

He further testifies as follows: —

Record, p. 141, cross-ints. and ans. 46–49.

"*Cross-Int.* 46. The initials C. L. H. opposite the items making up $837.66 indicate that that was the amount of interest due from Mr. Hayward on temporary loans on the 1st of April, '67, does it?

"*Ans.* Indicates the amount of interest due on temporary loans $6,500 and $20,000 to that date.

"*Cross-Int.* 47. What is there in that item that indicates that it is interest on those two sums?

"*Ans.* The amount of the items being the interest on those two loans from the dates to April 1, '67.

"*Cross-Int.* 48. Nothing else to indicate it in the item is there?

"*Ans.* No memorandum further than I have stated.

"*Cross-Int.* 49. Is there anything in the item to indicate it beyond what you have stated?

"*Ans.* Nothing further than the amount.

O. Now it will be found by calculation that $837.66 is *exactly*, to a cent, interest at six per cent on the *three* loans.

Int. on $6,500 from Oct. 17, '66, to April 1, '67, 6 p.c.					$177 66
"	$20,000	"	Oct. 19,	" " "	540 00
					717 66
Int. on $4,000 for 6 months, to April 1, 1867,				"	120 00
					$837 66

And in taking it to be so, it is assumed that the officers of the bank made *no mistake*, either in omitting from the account the $4,000 (which "naturally" should be there), and *no mistake* in ciphering.

On the other hand, it will be found by calculation that $837.66 is *not* interest at seven per cent on the *two* Hecla loans

for the same period, but is *thirty-nine* cents in excess of such interest. $837.27 being the int. at 7%.

Conant does us the favor to verify the correctness of these calculations, on —

Record, p. 146, cross-int. and ans. 106.

It will be seen that this error is not to be explained by including or excluding a *day*, or by any similar accident. Every accountant knows that an error of thirty-nine cents is as unlikely to occur in such a calculation in a bank, as an error of so many dollars; and would say, that for a bank not only to make such an error in ciphering, but at the same time to make the extraordinary error of omitting to take into the account at all the $4,000 loan, which belonged there (both of which errors have to be assumed to make good Conant's assertion), passes belief.

P. We submit that we *demonstrate* that interest was cast April 1, 1867, at six per cent, as the president says, and not at seven, as the cashier swears.

And we further submit that Conant's persistent testimony on this matter — if the Court will consider his office and the opportunity given him, in the cross-examination, to reconsider his statements and correct himself — stamps him as a *false witness*.

Mr. Gresley says that "in Courts proceeding in this course of examination" (that is, taking testimony by deposition on written interrogatories), "the rule of *falsus in uno, falsus in omnibus*, is a rule of unexceptionable justice.

Gres. on Ev. (Am. Ed. 1837), Part 1, Ch. 1, p. 12.

3 Greenl. on Ev. sec 378. 13 Ed

Q. If the foregoing demonstration required confirmation, it might be found in the fact that the coupons on the $4,000 U. S. bonds ($120), and the gold premium realized from the sale of the coupons ($40.80), certainly helped pay the $837.66, and were taken into account (by anticipation) *March 27th*, when the entry shown in bank balance of that date was made.

Conant, dep., Rec. p. 147, int. and ans. 44.

Ib., dep., Rec. p. 150, int. and ans. 79.

Even if that $4,000 loan had not been in the bank six months prior to April 1, as we say it had, it must have been there at least *four days*, which is enough in itself to upset the cashier's calculations.

We ask the Court to observe that "$\frac{1}{2}$ between 6 and 7 per cent" additional interest, which the president says appellant agreed to pay, up to April 1st (Record, p. 105, ans. 169), on $837.66, is $69.80, and would be more likely to be remembered and spoken of as "*sixty or seventy dollars*" than the sum of $62.52 would be, which the answer refers to as "*about sixty dollars.*"

This fact does not seem to us too trivial to be referred to in connection with the almost invariable use of the phrase "*sixty or seventy dollars*" by Conant and the alleged purchasers, when seeking to discredit the president by *hearsay*, they swear the president formerly *reported* that the appellant had promised to pay some balance of interest.

See Robinson, dep., Rec. p. 24, ans. 56.
Goodwin, dep., Rec. p. 75, ans. 22.
Conant, dep., Rec. p. 34, cross-ans. 20.
Ib., dep., Rec. p. 35, cross-ans. 30.

R. There is a fragment of testimony bearing upon the question of ratification, coming from Conant, as follows: —

Record, p. 38, Conant, dep.

"*Int.* 103. When did you discover that there was the difference of interest referred to in your answer to the 19th cross-interrogatory?

"*Ans.* Upon looking over the account, — this difference of interest was the difference between 6 and 7 per cent, — after crediting the excess on the bond loan, and was apparent to me at that time.

"*Int.* 104. Question repeated.

"*Ans.* At such time as I returned to the bank and saw the account. After the sickness referred to, and immediately following the settlement.

"*Int.* 105. Did you know of that difference when you handed the notes to Mr. Demeritt?

"*Ans.* Yes, sir.

"*Int.* 106. Referring to this same answer, did Mr. Hayward ever promise you personally to pay that difference?

"*Ans.* Verbally, yes.

"*Int.* 107. Where?

"*Ans.* I couldn't undertake to say where, but in conversation which I had with him subsequent to the settlement."

The appellant finds nothing, positively nothing, in Conant's testimony, except the foregoing, upon which the following paragraph, in the opinion rendered by his Honor in the Court below, could have been founded.

"On the other hand, the cashier states that there was a small sum of *sixty or seventy dollars* due to the bank after applying the proceeds of the sale of the shares, which the complainant promised to pay when he should be able, and his explanation is that, on his return to the bank, he found that the interest had been computed at six per cent, which he corrected; and, on making the deduction of the said balance due in the former transaction, it left this small sum due to the bank, which the complainant, in a subsequent conversation, promised to pay."

Opinion, Record, p. 175 (margin, p. 277).

When the cashier so testifies, he does not *mean* what he seems to say, unless he means to testify falsely.

This is manifest from his previous and subsequent testimony: —

Conant, Record, p. 35.

"*Cross-Int.* 29. From September 8, 1868, to March 11, 1872, did Mr. Hayward ever come or offer to pay any interest on the debt or principal to the bank, or in any way, to your knowledge, recognize any existing indebtedness of his to the bank in the matter of the loan for which this stock was once held?

"*Ans.* He did not.

"*Cross-Int.* 30. What was the matter of sixty or seventy dollars, then, which you have referred to?

"*Ans.* That was a matter of difference in interest, which he said he would pay when able.

"*Cross-Int.* 31. Was it interest which he agreed to pay under some arrangement between you and him, or under some arrangement between him and Demeritt?

"*Ans.* Him and Demeritt."

Conant, Record, p. 134.

"*Int.* 14. When the account was made up correcting the error allowing in credit the surplus named as the surplus arising from the sale of the government bonds, and casting the interest at 7 per cent, and determining the difference between the interest allowed at 6 and 7 per cent, and what was the balance after these different computations and corrections were made: was it before or after Sept. 8, 1868?

"*Ans.* At the time the account was rendered I was absent from the bank. In reviewing what had transpired in my absence, the matter, in common with others, came to my notice. It was then I observed the account was made at 6 instead of 7 per cent.

"[*Record, p. 39, the witness says he left the bank on the 5th September, 1868, and returned on the 10th of the same month.*]

"*Int.* 15. State what you did thereupon, if anything?

"*Ans.* Figured the difference between 6 and 7 and found the difference in the account, after allowing the surplus and interest on the same to be $62.52.

"*Int.* 16. In whose favor was the balance of $62.52?

"*Ans.* Balance due the bank from Mr. Hayward.

"*Int.* 17. What did you do about that balance, or collecting it, or having it collected, if anything?

"*Ans.* I did not do anything further than to refer it to Mr. Demeritt, who had the handling of it.

"*Int.* 18. State whether you did or not communicate the facts to him or give him a statement of it.

[*Objected to.*]

"*Ans.* Not to Mr. Hayward, but to Mr. Demeritt.

"*Int.* 20. Do you know what he did with it or about it afterwards? If so, state.

"[*Objected to, and counsel for complainant asked the Examiner to caution the witness to speak only what he knows from personal knowledge, and not what any one reported to him.*]

"*Ans.* I can state what was reported. I did not see him or hear him talk personally with Mr. Hayward.

"*Int.* 21. If anybody made any report about it, state who made it. I don't ask you now what they reported, but simply if there was a report, and who made it if there was a report?

"*Ans.* The substance of the interview was communicated in the conversation with Mr. Demeritt.

"*Int.* 22. What did Mr. Demeritt report and say? State fully, as near as you can.

"[*Objected to.*]

Ans. It was understood between Mr. Hayward and himself that if he was able he would pay the difference; that was about the idea I got.

"*Int.* 23. Do you mean that that was what Mr. Demeritt reported, or did you get your information elsewhere.

"[*Objected to.*]

"*Ans.* The impression I got in the conversation with Mr. Demeritt.

"*Int.* 24. State what Mr. Demeritt said on that subject in words and substance as near as you can.

"[*Objected to.*]

"*Ans.* It was the understanding between himself and Mr. Hayward that if he was ever able he would pay the difference.

"*Int.* 25. Did you know or hear anything of Mr. Demeritt going to see Mr. Hayward again, and of his reporting any interview about it subsequently to the report named?

"[*Objected to.*]

"*Ans.* I am not quite clear, but think no."

The counsel for the defence, after the cashier had testified as quoted, returned to the same subject with almost ludicrous frequency.

See Conant, dep., Rec. p. 148, ans. 58–61.

See Conant, dep., Rec. p. 149, ans. 64–67.

But through it all, in no instance, does Conant repeat his "*verbally*, yes"; or *intimate* that *he himself* ever spoke to appellant on the subject.

That the witness did not *mean* what he seems to say, is fairly inferred from the fact, that the *answer* (signed by him), while it twice avers a promise to the *president*, nowhere mentions a like promise to anybody else. How could he have omitted a statement so important to the case the appellees were seeking to make, if such a promise had ever been made to *him?*

"*Verbally*, yes," is a solecism. The appellant is willing to believe the witness meant to say, "*Virtually*," yes, or said so, and that the Examiner misunderstood him; and that he was only repeating the "hearsay," in which he dealt so freely, that such a promise had been made to the president, and interpreting a promise to that officer as a promise to him; again answering "as cashier of the bank," as he said he answered a previous question.

Record, p. 41, int. and ans. 147.

But certainly "verbally, yes," in which we have not a *word* the appellant *said*, at most the cashier's *understanding* of what he said, can't prove *a promise*.

Moreover, if anything is proved, it is proved that nobody ever communicated to appellant knowledge of the existence of the balance, the cashier says he promised to pay, which of itself would seem to be decisive.

8. At the one interview which the cashier says he had with the appellant after September 8th, when he "expressed himself, *refering to the account*" (Exhibit 21) "as highly gratified at being relieved from under the harrow," he says nothing to the effect of "verbally, yes."

Record, p. 28, int. and ans. 28.
Record, p. 147, int. and ans. 48.
" " 43. " " " 34 Harywan

We only desire to observe, further, upon the testimony last quoted, that the *account* to which witness refers, in his answer, p. 28, is *Exhibit* 6 (produced, Record, p. 32, ans. 75), and

that this Exhibit 6 was claimed to be the original of Exhibit 21, until appellant produced the latter (Record, p. 50, int. 29).

See Conant, dep., Rec. p. 28, ints. 25–28.
Ib. Rec. pp. 31, 32, ints. 68–75.

There is at least one significant difference between Exhibit 6 and Exhibit 21. The latter contains no suggestion of a subdivision of $39,257.16 into three sums, denoting *three purchasers*, as the former does.

VI PROPOSITION (PRIOR ASSENT AND CONCURRENCE).

Thus far it has been assumed, for the argument's sake, that appellant concurred and joined in the contract or arrangement of Sept. 7, 1868, and assented to the proposition of the three directors to buy his stock for a price that should cover his "indebtedness entirely," as the answer expresses it.

A. But we submit that there is no sufficient, competent proof of this averment.

It rests solely upon Demeritt's testimony of what passed between him and appellant *Sept.* 7, 1868, — Demeritt, whom they make such effort to discredit in respect to the issue of ratification.

The witness gives us *not one word* that appellant *said;* only his *understanding* of the conversation; his inferences from it.

We have a right to assume that the appellant did not *utter* a word, for we have a right to say that the testimony only amounts to this, that "*he didn't object.*"

A conversation cannot be proved by a witness who only states his understanding of it.

Hale *v.* Silloway, 1 All. 21.
3 Greenl. on Ev. sec. 375

B. Demeritt's testimony is, that after the proposition of the three directors to buy, he called on the appellant "and told him" he "thought he could sell it to those gentlemen." Asked,

"What did he say to it?" The witness answers, "He assented to it. He didn't object."

Demeritt, Record, p. 85, ints. and ans. 24–26.

Not a word more, even, did the witness say to *him*, except to tell him the price, which he says was the "amount of the debt," and subsequently asked, on cross examination, if he named "any sum," he answers, "I didn't name any sum, because I told him enough to pay the indebtedness."

Demeritt, Record, p. 87, cross-int. and ans. 18.

C. If this is competent evidence of this momentous conversation, in view of the rule of evidence just referred to, we submit that it is wholly insufficient under the great rule referred to in the early part of our brief (p. 8), under the burden of which trustees must make proof of "a clear and distinct contract" if they seek to sustain a bargain with their *cestui que trust* for the purchase of the trust property.

D. The appellant expressly denies any such assent or concurrence as Demeritt testifies to.

Hayward, dep., Rec. p. 48, int. and ans. 14.
Ib. " " 49, " " 23–25.

Here is oath against oath, in respect to an averment making a material part of their affirmative defence, and the burden is on the appellees.

E. The appellant is corroborated, and the appellees discredited, by all the circumstances of the case that so strongly tend to raise a *just suspicion of the bona fides of the whole transaction*, many of which have already been referred to, and others are yet to be pointed out.

F. There are facts, *known to the witness at the time* of the alleged interview, and such as he was bound to communicate to the appellant then, but did not, the concealment of which was inconsistent with fair dealing.

a. The fact testified to by Robinson that before the directors offered to buy, and when of course he could only have referred to a forced sale, the president "thought this stock would bring nearly enough to pay the loan, or quite."

Robinson, dep., Rec. p. 80, ans. 3.

b. The fact that the three directors had been investigating its prospective value.

Robinson, dep., Rec. p. 19, ans. 18–20.
Ib. " " 20, " 28–44.
Ib. " " 21, cross-ans. 8–10.
Goodwin, " " 16, ints. and ans. 12, 13.

Robinson, in answer to ints. 39 and 41, Rec. 20 (supra), mentions Goodwin, White and Demeritt as persons from whom, among others, he had got information about the stock.

It is common knowledge that the value of stocks of this class depends upon their *prospective* value, upon facts *known only to inquirers*, unlike government and bank stocks.

c. The fact that one of the three directors was ready to be "one of one, two, or three" to buy it for the amount of the debt.

White, dep., Rec. p. 129, int. and ans. 3.

d. And the more significant fact that the question of selling *at auction* had been discussed by the president and the three directors, and the conclusion come to against such a sale.

Robinson, dep., Rec. p. 79, int. and ans. 3.

If these facts had been made known to appellant he might have had the wit to suspect the directors were not the disinterested purchasers the answer avers them to have been; or to wonder why, if they were, and had *his* interests in view, they did not put up the stock at auction, and bidding the amount of the debt (which they were willing to give) as an upset price, give him the chance of a better bid from somebody else, who also had been investigating its prospective value.

And he might have had such knowledge of the market as to find the explanation in Goodwin's testimony, who, when asked

by appellees, "how the market was at that time, whether fluctuating, uncertain or firm?" answered that "I think it fluctuated; in fact four or five hundred shares offered in the market might depress the price $5 or $10; *and if one wished to buy that number of shares*, he might be *compelled to pay* $5 to $10 *more than the quotation*."

Goodwin, Record, p. 75, ints. and ans. 26 and 27.

G. There were yet other facts concealed from him of which he had a right to know, — the fact that already the three directors had agreed to buy on the terms named, if he approved; and that the sale was to be on credit, and the bank was to furnish the money on their notes at six months.

Goodwin, dep., Rec. p. 74, ints. and ans. 9 and 10.
Robinson, " " 78, int. and ans. 33.
Ib. " " 21, cross-int. 4.
White, Rec. p. 129, int. 2.

Robinson Rec. 33 and 52

H. The proposition was sprung upon him on the 7th September, under the pressure of a threatened adverse sale; was meditated when vote of Aug. 17th passed, as we believe; and he was not in a condition, bodily or mentally, as they knew, to justify them in assuming he had given a deliberate assent and concurrence to a proposition made in a manner apparently so casual.

I. No inference in support of the averment of prior assent can be drawn from his receipt of Exhibit 21. That the credit therein given had resulted from a sale of his stock he would infer, no doubt, but nothing in the exhibit suggests any other than an adverse sale.

Comparing Exhibit 21, with Exhibit 6, the original from which Exhibit 21 was made, as Conant testifies, the $13,085.72, showing that the $39,257.16 had been, for some reason, divided by *three*, and which might, perhaps, have suggested to him an inquiry, is left out.

K. His Honor, in his opinion, seems to give weight to the testimony of the three purchasers, to the effect that Demeritt reported to them Hayward's assent to the proposed sale: but we cannot think such testimony other than hearsay.

VII PROPOSITION (BONA FIDES).

There are certain facts, proved beyond any dispute, — acts of omission on the part of the appellees, and the alleged purchasers, — that, from their nature, are *incapable* of satisfactory explanation, that justify doubts in respect to every branch of the appellees' defence, and raise a just suspicion of the good faith of the whole transaction.

1. The absence of any written or record evidence, when a word from the appellant, *under his hand*, would have been enough, and, if the averments of his prior assent or subsequent ratification are true, could have been so readily obtained.

Fraley v. Mousley 4 De Gex J. 78

2. The fact no one of the alleged purchasers ever exchanged a word with the appellant, as to their proposed purchase, either before or after Sept. 8.

3. The fact that in all the time that intervened between the transfer and the appellant's proposal to redeem, they did not pay the "balance" of his indebtedness (even if it *was* $464.16) claimed to be yet outstanding.

4. The omission to examine *Proctor*, the only other director (besides the president and the alleged purchasers) who was present at the regular meeting of directors on *the 7th of September*, 1868, touching his knowledge or approval of the contract of sale, or the propo-ition to purchase (*first made on that day*).

Record, p. 161, Ex. 14.

5. Examining Curtis, another director, on an immaterial point, and failing to ask him a question touching his knowledge or approval.

Curtis, dep., Record, p. 127.

6. Omitting to put the stock up at auction, and, there bidding the amount of the appellant's debt, as an "upset" price, giving the appellant the chance of a better bid from somebody else, who had also been investigating the prospective value of the stock.

7. The strange disappearance of the original notes or memoranda, given by appellant for the loan, originally called for by appellant, and which, if produced, might by indorsements thereon, or by the omission of indorsements, embarrass the defence; and Conant's extraordinary testimony in respect to the indorsements and *copies*. See —

Conant, 1st dep., Rec., p. 26, ints. and ans. 3–10.
Ib. 2d dep., Rec., p. 150, int. and ans. 76.
Ib. 2d dep., Rec., p. 143, cross-ints. and ans. 72–73.
Ib. 2d dep., Rec., p. 150, ints. and ans. 76–78.

We insist that it is an almost *necessary* conclusion, that the purchasers simply *took* the appellant's stock, knowing, at the time, they had no right to say they had bargained fairly for it, even if they *had* the president's *word* that poor Hayward *"didn't object,"* taking the hazard, for the sake of the enormous stake for which they were playing.

VIII PROPOSITION (PROBATIVE FORCE OF THE ANSWER).

A. The opinion annexed to the Record discloses that the learned judge regarded the answer as a duly sworn answer, and as evidence in behalf of the defence, upon the two principal controverted questions of fact, viz., that of prior assent, and that of subsequent ratification. And we may be pardoned for expressing the belief that the weight thus attributed to the answer turned the scale in the Court below.

B. But we respectfully submit that, in treating the answer otherwise than as a pleading, the learned judge overlooked the facts: —

First. — That the *bill does not make the cashier, nor any other officer, a defendant.*

Second. — That it *does not call for or require of the bank an answer on oath.*

C. In such case, we did not suppose there was any rule of pleading or practice that enabled a corporation to make its

answer evidence in its behalf, at the final hearing, by causing it to be sworn to by one of its officers, although it may thus give it the quality of an *affidavit*, in interlocutory proceedings.

D. A corporation aggregate *is required by law* to put in its answer, not on oath, but under its seal.

Story, Eq. Pl., § 874.
Dan. Ch., p. (4th Am. Ed.) 735, *n.* 2.
Fulton Bank *v.* N. Y. & S. C. Co., 1 Paige, 311.
Bronson *v.* La Crosse & M. R. R , 2 Wall. 283.

E. On the other hand, an individual defendant *is required by law* to answer on oath, and before the amendment to the 41st Equity rule of March 4, 1872, a waiver of the oath did not deprive him of the right so to answer.

Clements *v.* Moore, 6 Wall. 299.

F. It was not for the appellant to take exception to the oath to the answer or to move the Court in the matter. The appellees had the right to give to their answer the quality of an affidavit.

It is a question of the competency of evidence.

Gerrish *v.* Towne, 3 Gray, 82–91.

G. The answer is not under the *corporate seal*. The impression in the Record purports to be the seal of the notary; and no authority appears empowering Conant to sign, seal or swear to it.

H. The answer purports to be sworn to before a notary public of Massachusetts, a magistrate before whom Rule 59 of this Court (and of the Circuit Court) does not authorize a defendant to swear.

Rule 9 of the Code of March, 1822, authorized a defendant to swear before a notary public or justice of the peace. But the Code of 1822 was repealed and superseded by that of March, 1842, which substituted, for the old rule, Rule 59 of the present code.

This Court has full power to prescribe and regulate the "forms and modes of taking and obtaining evidence, and of obtaining discovery."

Chap. 188, § 6, Acts of 1842 (5 Stats. at l., p. 516).

I. It is common practice to swear to *affidavits* in equity causes in the Circuit Court, informally, before notaries and justice of the peace. The informal character of the jurat in this case raises the presumption that it was only intended to give the answer the effect of an affidavit.

The Act of 1850, giving notaries the same power to administer oaths as justice of the peace, required the notarial seal to the jurat.

Chap. 52, Acts 1850 (9 Stats. at l., p. 458).

The Record, by inadvertence, represents a seal. But none was affixed by the notary.

J. Mr. Daniel says it is an universal principle in all courts, that any irregularity in a jurat, unless expressly waived, may be objected to in any stage of the cause.

1 Dan. Ch., p. (5 Eng. Ed.) 596, 650, 684.

K. Assuming that the answer acquired competency as evidence from Conant's oath, the learned judge, referring to that part of the bill where the appellant alleges, by *way of pretence*, certain matter he anticipates may be set up in defence, viz., *some form of sale*, and to the charge that if the appellees have pretended to sell, etc., or done any act tending to transfer the title to the stock, etc., it has been done without notice, without right, and in fraud of his just rights; held that the averments in the answer that appellant had *notice* of the *vote* of Aug. 17, 1868, and the averments of *prior assent and subsequent ratification*, were responsive.

L. With great deference we submit, in respect to the pretences and charges referred to, that it is fairly to be inferred from their terms, that the appellant had in mind no other than

an *adverse* sale, and the neglect by the appellees to observe the formalities required by law thereat.

On the other hand, the averments in the answer, regarded as responsive so far as material, are in support of an alleged purchase and sale, the reverse of an adverse sale, made in intended pursuance of a *bargain* between the parties.

M. The averment of *notice of the vote* is a wholly immaterial averment.

But the averments of *prior assent and concurrence* in the bargain, and of *subsequent ratification*, are essential to the affirmative defence the appellees set up.

Without these averments they would not state a *prima facie* case. An averment of a private sale to the three directors, and no more, would plainly be insufficient. So an averment of such a sale and purchase in intended pursuance of a bargain upon a condition precedent, with an admission of the non-performance of the condition, by their own fault, would be insufficient without an averment of waiver, or its equivalent.

Seitz *v.* Mitchell, 4 Otto, 580.
Clements *v.* Moore, 6 Wall. [illegible]. 299
Roach *v.* Summers, 20 Wall. 165.
Un. M. Ins. Co. *v.* Com. M. M. Ins. Co., 2 Curt. 524, 527.

N. The allegation in a bill by way of pretence, of matter it is anticipated may be set up in defence, is not an allegation by which the plaintiff is bound; is not an admission of the matter so alleged.

Story on Eq. Pl. § 31.

If the defendant sets up the anticipated matter, he must prove it.

Now the appellees set up a purchase and sale, by agreement, and they must prove it; and they must prove it as they *state* it; for, although Courts of Equity do not in general require so strict conformity of the proofs to the allegations as do Courts of Law, yet, when an agreement is alleged, it must be proved as stated, in equity as well as at law, says Mr. Gresley.

Gres. Ev. 171.

O. Conant has been examined as a witness. The Court is informed of the extent of his knowledge. The appellant only asks that any evidence found in the answer he has sworn to shall be estimated by the testimony in his deposition.

Clark's Ex'rs *v.* Reinsdyk, 9 Cranch, 319, 325.

P. Ch. J. Marshall's criticism, in the case cited, of unqualified averments of matters beyond the knowledge of the pleader, in an answer under oath, is most applicable to the answer in the case at bar.

Carpenter *v.* Ins. Co., 4 How. 219.

Even in this case, of a denial of an allegation vital to plaintiff's case, the Court only valued the denial according to the means of knowledge of the party making it.

IX PROPOSITION (STATUTE OF FRAUDS).

A. The Statute of Frauds, if not otherwise applicable to this case, serves to illustrate the rules of evidence by which it is to be considered.

That statute, says a learned writer, "simply prescribes, as a rule of evidence, that in cases where" contracts within the statute "are sought to be enforced, oral proof shall not be received."

Browne, Stat. Fr. (2d Ed.), § 115.

B. Whatever the negotiation of Sept. 7th, 1868, in which the appellant, the appellees, and the three directors are averred to have concurred, is called, it is not easy to distinguish it from a verbal bargain for the sale and purchase of the appellant's stock, in which, to all intents and purposes, he was vendor. Certainly he was a necessary party to a sale to the three directors, at private sale.

C. So considered, it was within the fifth section of the Statute of Frauds of Massachusetts (which is substantially identical with the 17th Section of the English Statute), and incapable

of proof by oral testimony; the only question being whether the transactions of Sept. 8th operated to take it out of the statute.

Gen. Statutes, Mass., Chap. 105, *Section* 5.

D. The Supreme Court of Massachusetts has repeatedly decided that the words "goods" and "merchandise," in this statute, are both sufficiently comprehensive to include stock or shares in corporations.

Tisdale *v.* Harris, 20 Pick. 13.
Baldwin *v.* Williams, 3 Met. 367.
E. R. R'd *v.* Benedict, 10 Gray, 212.
Browne Stat. Fr., S. 296–298.

E. "A verbal contract, within the statute, cannot be enforced in any way, directly or indirectly, whether by action or in defence."

"The clear rule of law is that such a contract cannot be made the ground of a defence any more than of a demand."

Browne Stat. Fr. (2d Ed.), §§ 122 and 131.
King *v.* Welcome, 5 Gray, 41.

F. Any act relied upon to take a verbal contract out of the statute must, of course, be an act *binding* on the party against whom it is sought to enforce it. And it must be an "unequivocal" act, "in pursuance" of the contract.

It follows, that a contract on a condition precedent can be taken out of the statute only by performance or waiver.

Browne (2d Ed.), Stat. Fr., § 317.
Tempest *v.* Fitzgerald, 3 B. & Ald. 680.
Denny *v.* Williams, 5 All. 1.

G. But, irrespective of the conditional character of the contract of Sept. 7th, the transactions of Sept. 8th were exclusively the acts of the appellees and the alleged purchasers. The only authority by which they can justify their summary dealing with the stock on that day was derived from and *made part* of the contract.

If those transactions had been the acts of the appellant the case would be different; but they were not his acts; and his *words* (if he uttered any on the 7th), constituting part of the contract to be proved, and not being *res gestæ*, cannot be resorted to characterize the transactions of the 8th, or to show them to have been his acts.

Browne, Stat. Fr. (2d Ed.), §§ 319, 320.
Shindler *v.* Houston, 1 Const. (1st N. Y.) 261.
Ely *v.* Ormsby, 12 Barb. 570.
Edan *v.* Dudfield, 1 Ad. & Ell. (N. S.) 302.

II. The act of an agent, if within the terms of his authority, may be sufficient, under the statute, but a *party* to the contract cannot be such agent: he must be some third person.

Fairbrother *v.* Simmons, 5 B. & Ald. 333.

The contract or bargain was, in a sense, tripartite, the appellees severing, and placing the purchasing directors in the attitude of vendees. But it cannot be disputed that the appellees themselves were also parties.

X PROPOSITION.

Even assuming the case to involve only the question of authority in the appellees to make the sale they did —

They aver that they acted "by virtue of the express authority in writing," it "remaining in full force," as well as by virtue of an *enlargement* of it, which they seek to prove by parol.

It is generally true that "where an express power is conferred by writing it cannot be enlarged by parol evidence." And this case does not come within any of the exceptions.

Story, Agency, §§ 79–83.

The written authority, without enlargement, did not authorize a sale to their directors; it did not authorize a private sale.

Middlesex Bank *v.* Minot, 4 Met. 325.
Washburn *v.* Pond, 2 All. 474.

The "discretion" given in the written power is not to be deemed an unlimited discretion. It had reference to time. The answer so construes it. It imports such discretion as trustees for sale are bound to exercise.

Ans., Record, p. 9.
Story, Agency, § 83.

Neither the written authority, nor the verbal authority averred, authorized a sale on credit, — much less such a sale with the privilege of returning the stock at the expiration of the credit.

Story, Ag., § 78.
Wiltshire *v.* Sims, 1 Camp. 258.

XI PROPOSITION.

A. The appellees have complete control of the stock, and have it in their power to cause the reconveyance of it to be made for which the appellant prays.

At most the stock has only been transferred from the name of their cashier, into the names of the three directors.

The alleged purchasers are charged, in the fullest sense, with *notice;* and neither the control of the bank over the stock, nor the appellant's right to a conveyance, are affected by the transfer. Asts Appellant's Brief & in E. Montague & v. Boston & F. Iron Works 108 Mass. 248

B. But even the Record title of the three directors is imperfect.

Sept. 8, 1868, the *Record title* stood in the name of "R. B. Conant, Cashier." See certificates.

Ex. 17 and 18, Rec., pp. 163, 164.

The blank transfer, signed by "John Demeritt, President," indorsed on the certificates, was not an effectual transfer of certificates expressing on their face that they were "transferable only on the books of said company, by the holder hereof, in person, or by a conveyance in writing recorded in said books."

Shaw *v.* Spencer, 100 Mass. 382.

The transfers on the books purporting to be signed "John Demeritt, Pres., for R. B. Conant, Cash., E. P. Adams, Atty," were written by Adams, with no authority from Conant, in writing or otherwise.

Goodwin's dep., Rec., p. 44, ans. 1–5.

The alleged purchasers had made no transfer of a single share of the stock, up to the time when the testimony in the cause was taken.

Seabury, 1st dep., Record, p. 45, ints. and ans. 8, 9 and 10.
Goodwin, dep., Record, p. 17, ints. and ans. 31–33.
Robinson, dep., Record, p. 19, int. and ans. 23.
White, dep., Record, p. 66, int. and ans. 9.
Ex. z, Record, p. 156.

C. But if the appellees have put it out of their power to make reconveyance of the stock, the appellant is entitled to compensation in damages, to the extent of the full value of the stock and its accretions and dividends, less the debt and interest, and the appellant claims that he is entitled to the highest value of the stock since Sept. 11, 1872, when he gave to appellees the notice of that date, proved in the cause.

Exhibit 4, Record, p. 157.
Peabody *v.* Tarbell, 2 Cush. 226.
Andrews *v.* Brown, 3 Cush. 130.
Pingree *v.* Coffin, 12 Gray, 228–305.
Milkman *v.* Ordway, 106 Mass. 232.

XII PROPOSITION.

The directors for the year 1868 were eight in number. A list of them is put in: —

Exhibit 22, Rec., p. 166.
Proved by Goodwin, Rec., p. 73, int. 3, ans. at end of deposition, Rec. p. 79.

At the time of these transactions, September, 1868, one of them, Hastings, was in Europe. At the time the testimony was taken Tilton had died; the others were living, and continued to be members of the board.

Goodwin, dep., Rec., p. 74, ints. and ans. 16, 17.

Goodwin, who, in January, 1873, succeeded Demeritt as president, testifies: "We consider that any meeting where a quorum is present is a regular meeting to transact business."

Goodwin, dep., Rec., p. 76, int. and ans. 14.

Now, Hastings being abroad, there could not have been, during his absence, a quorum present at any meeting, without one at least of the three alleged purchasers.

So that when Goodwin, in answer to Mr. Ranney's question, "Was there any vote of the directors, directing or authorizing the sale of this stock *to you and the two other gentlemen*," — swears that "there was"; and when on cross examination, in answer to questions, in substance, "Will you swear that the board of directors, at a meeting held within one month from the 8th of September, 1868, at which a *quorum* of the board was present" ("exclusive of the purchasers"), "passed a vote sanctioning" the sale "to you three gentlemen," he swears: "I think it was." "To the best of my recollection," he swears falsely.

Goodwin, dep., Record, p. 74, ints. and ans. 13, 14.
Ib. dep., Record, p. 76, cross-ints. and ans. 10 to 17.

We ask the Court to examine the testimony of the other alleged purchasers, that the appellant may have its judgment upon their fidelity to their oaths.

Robinson, Rec., p. 18, ints. and ans. 3, 4.
Ib., Rec., p. 22, cross-int. and ans. 12.
Ib., Rec., p 23, ints. 50, 51.
(He refers to the vote of Aug. 17th.)
Ib., Rec., p. 24, cross-ints. and ans. 18 21.
White, Rec., p. 69, cross-ints. and ans. 25–27.
Ib., Rec., p. 70, ints. and ans. 22–24.
Ib., Rec., p. 71, cross-ints. and ans. 41–45.
See Exhibit 14, Rec. p. 161 (meeting of Sept. 7, 1868).

MEMORANDUM.

Hayward's dep., Rec., p. 49, *int. and ans.* 23.

The appellant's statement in this answer has not been questioned. The counsel for the appellees, out of the three hundred and eighty-two questions he put to Demeritt, nowhere sought to qualify it.

The statement in the answer to the bill that the appellant said "he would *do nothing about it*," referring to the payment of the loan prior to Sept. 7th, is not supported by any evidence, and is only mentioned because the statement has found its way into his Honor's opinion.

E. F. Hodges

Supreme Court of the United States.

No. 273.

CHARLES L. HAYWARD, Appellant,

v.

THE ELIOT NATIONAL BANK.

RESPONDENT'S BRIEF.

A. A. RANNEY, of Boston, Mass., for Respondent.

United States Supreme Court.

CHARLES L. HAYWARD, APPELLANT,

v.

THE ELIOT NATIONAL BANK.

RESPONDENT'S BRIEF.

STATEMENT.

The bill in this case is framed upon the theory and with express averments that there was never any valid sale of the four hundred and fifty shares of the capital stock of the Hecla Mining Company, in question; that any sale made, or pretended to be made, was without notice to complainant, without right, and in fraud of his just claims; that in the years 1869, 1870, 1871, cash dividends were declared and paid thereon to the bank, or some party or parties acting under its authority; that in the union of the Hecla and Calumet Companies, in May, 1871, the bank, or those then holding the said shares under its authority, became entitled to and received the same number of shares in the new company in place thereof when surrendered; that the new company subsequently and at different times increased its capital stock, and paid to the stockholders several stock and cash dividends, and that the bank, either directly or through the intervention or in the names of parties holding only through it, received thus, and held at time of filing bill, nine hundred shares of stock in the Calumet and Hecla Mining Company, together with certain cash dividends paid and received in like manner; and that respondent is chargeable in law as holding these in pledge as the property of complainant.

The respondent in its answer under oath explicitly and un-

equivocally denies these averments, and sets forth on the contrary thereof, a valid private sale, duly authorized, made with notice to complainant, by his prior assent and with his subsequent sanction, the sale being made by the president of the bank, under a vote of the directors of Aug. 17, 1868, and negotiated Sept. 8, 1868, with his full knowledge and assent; that the price got was supposed at the time to be enough to pay his debt, but there was found on correction of the account to be still due a small balance of $62.52, which he promised to pay to the bank; and that the subsequent payments of money in dividends by the Hecla Company, and the surrender of the stock, the issues of new stock and payments of dividends, were solely for the use and benefit of the purchasers as individuals, and the respondent had no part, lot, or interest whatever in the same, and that it never received nor held, directly or indirectly, the new stock nor the dividends.

Upon the bill, answer, and evidence not controverted, all the other material and important facts involved in the case are beyond dispute, and need only to be briefly stated.

It is admitted or appears that complainant, in the month of October, A. D. 1866, having bought on speculation four hundred and fifty shares of stock in the Hecla Mining Company, a corporation organized under the laws of the State of Michigan, and having its office and books in Boston, Mass., obtained upon it of the respondent two temporary loans, amounting to the sum of $26,500, giving his demand notes, and transferring the said stock, by instruments absolute in form, but in fact as security, and for which the bank took out and held in the name of the cashier new certificates as the owner of record. A repayment was promised in a short time. But the stock immediately thereafter depreciated in value in the market, complainant became embarrassed pecuniarily, and failed to redeem. When transferred, only $25 a share had been paid upon it as the par value (p. 47, ans. 15); it was subject to future assessments, which were subsequently made and called from time to time, and the complainant being urged in vain to pay them, the respondent, in order to save the security, was compelled to and did meet them, paying in all at the rate of $22 a share, with

accrued interest, and passed the same into the account. The complainant paid the interest at the rate of seven per cent, up to April 1, 1867, but failed to pay any part of the principal or interest after that, although repeatedly besought to do so, with liberal offers of aid to help him carry the stock if so disposed. The respondent held a written power of attorney, given it while acting as a State bank, and still in force, authorizing it to sell all securities then held or thereafter taken, either at private sale or public auction, and without notice. (Ex. 28, p. 169.)

Besides, they took and held another power, dated Nov. 9, 1867, authorizing them specifically to sell this stock *at their discretion*, and apply the proceeds upon the said loans. (Ex. 3, p. 157.)

The said stock since its transfer in October, 1866, had been depressed, and was widely fluctuating in price in the market, ranging from $15 a share, the lowest, to $70 a share, the highest price, and at which it stood in August, 1868, not enough to make the bank whole, if sold; and on Aug. 17, 1868, the respondent, by its board of directors, took decisive action in the shape of a formal vote of that date, which was communicated to the complainant (Ex. 20, p. 165), requiring him to pay $5,000 during that week and the same amount the next week, *and in default thereof instructing the president to sell the stock.*

Complainant failing to comply with the requirements of this vote, the president proceeded to sell under the same, and the stock, on Sept. 8, 1868, was sold and caused to be transferred in equal portions to John P. Robinson, Joseph H. White and W. H. Goodwin, three of the directors, and each took out new certificates on that day for their respective shares, said Goodwin buying for himself and one Weld on joint account. The price for which it was thus sold was about $87, being some $10 a share above the then market price, the same being agreed upon at the time as a sum supposed to be sufficient to cancel the indebtedness of the complainant. An account (Ex. 21, p. 166) was made up and rendered accordingly to the complainant, on the same day, with a credit of $39,257.16, balancing the same. The complainant then knew of the sale, and of the credit given for the amount of the proceeds thereof, and made no objections thereto (pages 55–6, ans. 103–115.)

The stock ever after that time was treated as the exclusive and absolute property of the purchasers. They held the stock as their own, under certificates taken out in their own names, received and enjoyed to their own use all the subsequent issues of stock and dividends paid. After the sale, to Oct. 6, 1870, the stock fluctuated in price in the market, ranging from $75 to $88 a share. It then went up to $175 a share, at which price it sold on April 19, 1871 (pp. 63–4). Complainant never made any objection to the sale, and took no action to disaffirm it until March 11, 1872, after the new stock had become very valuable and the consolidation of the two companies had proved a successful enterprise.

While he denies that he knew at the time that the purchasers were directors in the bank, and says he first learned this fact in the autumn of 1871 (p. 49, ans. 23), he admits knowledge of a sale being made, of the price received, the receipt of the account (Ex. 21), and says he made no further inquiry, "feeling so dull at the time, cared little about anything, — whither the stock went, or anything else, or about anything" (p. 55, ans. 111); and believing the stock had been sacrificed. (Page 56, ans. 12.)

Beyond and besides these facts, respondent contends that it not only does not appear and is not proved by the complainant, as alleged in his bill, that the sale was invalid, for any reason, and that respondent at the time of filing the bill, held directly, or through others acting by its authority, the stock and moneys prayed for, entitling him to redeem; but that it does appear affirmatively that the sale made on Sept. 8, 1868, was, on the contrary thereof, a valid sale made by written authority, with notice, and under the prior verbal assent of the complainant, and that the same was by him subsequently sanctioned and affirmed.

This is the main field of controversy.

ARGUMENT

I.

We proceed to consider the proof upon this controverted issue of fact. See Agreement, p. 155.

1. It stands clearly proved upon complainant's evidence, as

well as that of respondent, that the bank did not get the new stock or dividends; that an actual sale was made and completed Sept. 8, 1868; and that the only objection which can be raised to it is that the persons buying were directors in the bank.

J. G. Weld, p. 13, ans. 1 to 30.
John P. Robinson, p. 17, ans. 1 to 30 on p. 26.
Wm. H. Goodwin, p. 44.
Royal B. Conant, pp. 26 to 43.
J. H. White, pp. 66 to 71.
Charles W. Seabury, p. 82.

The purchasers received and held, exclusively to their own use, all the new stock and dividends paid.

2. The two powers of attorney (Exhibits 3, 28) gave ample authority to sell, independently of any power to sell as incident to a pledge or mortgage.

The vote of Aug. 17, 1868 (answer to bill, p. 9, and proved by Conant, p. 30, ans. 58), gave the president full authority on the part of the bank, and imposed an absolute duty, to sell, in the event provided for, and which came after full notice and opportunity given to complainant. (Ex. 20.)

Dep. of *Curtis*, p. 127, ans. 5.
" *Demerritt*, p. 84, ans. 13 to 15.
" *Conant*, p. 33, ans. 8.
" *Hayward*, p. 72, ans. 7; p. 52, ans. 48; p. 53, ans. 62.

3. The president accordingly made the sale for the bank, acting under this vote, and in pursuance of complainant's authority.

Dep. of *Robinson*, p. 18, ans. 3, 4; p. 19, ans. 24; p. 21, ans. 1; p. 22, ans. 16; p. 23, ans. 50 to 53; p. 79, ans. 3.
Dep. of *Goodwin*, p. 15, ans. 4 to 7; p. 69, ans. 27.
Dep. of *Demerritt*, p. 84, ans. 11 to 24.

4. The proposition to buy on the part of three directors, with the first thought of same, occurred after the vote of Aug. 17, 1868,

and not until Sept. 7, 1868, upon the refusal of complainant to comply with the reasonable requirement of the bank.

Dep. of *Robinson*, p. 22, ans. 12; pp. 22, 23, ans. 45 to 57; p. 24, ans. 61; p. 79, ans. 3.

Dep. of *Goodwin*, p. 15, ans. 3 to 7; p. 73, ans. 6 to 9; p. 75, ans. 2; p. 77, ans. 31; p. 78, ans. 33.

Dep. of *White*, p. 66, ans. 4, 5, 10, 11, 13, 19; p. 68, ans. 1 to 8; p. 69, ans. 21, 22, 23; p. 69, ans. 27 to 35.

Dep. of *Demerritt*, p. 84, ans. 20 to 24; p. 115, ans. 128.

It cannot be justly charged, therefore, that the purchasers had this in view when passing said vote.

5. The purchasers were induced to buy at a rate about $10 a share above the market price, because the loan had laid so long and become a subject of complaint by the bank examiner, and because of their interest in the bank as stockholders, and through a desire that the bank should lose nothing.

Dep. of *Robinson*, pp. 79, 80, ans. 3.

Dep. of *Goodwin*, p. 77, ans. 31.

Dep. of *Demerritt*, p. 104, ans. 157, 158.

6. They acted openly, with entire fairness and good faith, getting the sanction of the other directors, individually or collectively, at a special meeting, and taking especial pains to have the president first get the assent of the complainant, and not completing the sale until the president reported his full assent. It required even then much urging on the part of the president to induce the sale as made, because the sum needed to pay the debt came to so much more than was at first reckoned and proposed to be paid.

Dep. of *Robinson*, p. 21, ans. 4, 5; p. 22, ans. 15; p. 22, ans. 45; p. 24, ans. 61; pp. 24, 25, ans. 18 to 24; pp. 79, 80, ans. 3, 4.

Dep. of *Goodwin*, p. 78, ans. 33.

Dep. of *Jos. H. White*, p. 66, ans. 3 to 7; p. 67, ans. 10, 13, 17, 18, 19; p. 67, ans. 17, 18; p. 68, ans. 8; p. 70, ans. 20, 21, 22, 45; p. 69, ans. 29, 35.

Dep. of *Demerritt*, p. 85, ans. 22 to 28; p. 98, ans. 91 to 93; p. 101, ans. 120 to 147; p. 105, ans. 145.

7. There is positive proof that an express consent was first obtained. John Demerritt, the president, testifies that he did go and communicate the specific proposition, with the names of the proposed purchasers; that Mr. Hayward did not object but assented to it, and that he then reported this assent and approval to the directors, whereupon the sale was consummated.

Page 84, ans. 13 to 28; p. 86, ans. 40 to 45; p. 87, ans. 3 to 19, cross; p. 88, ans. 33 to 42, cross; p. 91, ans. 64 to 68; p. 92, cross, ans. 71 to 78; p. 98, ans. 84 to 95; pp. 98, 99, ans. 97 to 100; p. 100, ans. 110 to 116, 118, 120, 123, 125; p. 102, ans. 130; p. 103, ans. 145, 146.

The whole proceedings showed a careful regard for complainant's rights, and great caution on the part of intelligent men to have the transaction placed beyond any possibility of dispute.

8. The regular and formal transfers were immediately made of record, new certificates issued to the purchasers, as already shown, and an account (Ex. 21) was then made up by Mr. Harrington, a clerk, in the absence of the cashier, and delivered by the president to complainant, showing a sale of the stock with a credit of the proceeds balancing the same.

Dep. of *Harrington*, p. 71, ans. 3 to 15.
Dep. of *Hayward*, p. 48, ans. 11; p. 50, ans. 29.
Dep. of *Conant*, p. 31, ans. 66; p. 32, ans. 76.

It is all done on the assumption that the thing is known and assented to by the complainant, and the regular course was pursued in making the requisite transfers.

9. Mr. Conant, the cashier, returned to the bank Sept. 10, 1868, and upon reviewing the transaction found some errors in the account as made up by Mr. Harrington, in that the interest had been cast at only six per cent as the notes read, and not at seven as was verbally agreed, and also in not having allowed as a credit in the computation, $375.03, a balance of funds derived in the sale of some bonds held for another loan, and sold under power (Ex. 9) on Sept. 3, 1867, and which was or should have been applied in the interest

account, and as indorsed in fact on one of the notes. (Ex. 25.) He made, accordingly, a new statement or account (Ex. 29), showing a balance of $62.52 still due the bank, gave it to the president with the notes for adjustment by Mr. Hayward. The president reported to him that complainant promised to pay this balance. He likewise told cashier afterwards that he would pay the same.

Dep. of *Conant*, pp. 33, 4, ans. 13 to 20; p. 28, ans. 28; p. 35, ans. 30 to 33; p. 37, ans. 100 to 107; p. 39, ans. 42, and direct, 113 to 126; p. 133, ans. 8 to 25; p. 138, ans. 10; p. 139, ans. 31 to 33; p. 114, ans. 79 to 84; p. 147, ans. 46 to 50; p. 149, ans. 64 to 68.

10. The president also testifies to the discovery of this error by the cashier on his return, and of being told the same, and to his having interviews at some time with complainant about a balance of some $60 or $70, due as a difference of interest, and getting his promise to pay the same.

Page 122, ans. 351 to 356; p. 85, ans. 30 to 35; p. 104, ans. 161–6; p. 105, ans. 174 to 186; p. 107, ans. 191; p. 108, ans. 198, 200, 202–6; p. 118, ans. 299.

But in the course of his cross-examination he gets into an erroneous impression as to the time, as discussed hereinafter under No. 15.

11. The notes of complainant were not given up with the Exhibit 21, but were delivered by the cashier to the president for that purpose, and were retained for the payment first of the balance of $62.52 left still due and promised as stated.

Ev. of *Conant*, p. 34, ans. 17; p. 149, ans. 68 to 71.
" *Demerritt*, p. 88, ans. 22 to 29.

12. Complainant expressed his satisfaction with the result, and was glad that he had been "relieved from under the harrow," and promised to pay the balance of the corrected account.

Conant, p. 28, ans. 28, 30; p. 38, ans. 103 to 107; p. 147, ans. 46 to 50.

13. Demerritt reported and stated to the directors and cashier that complainant promised to pay this balance of $62.52 when he was able to do so.

Robinson, pp. 23, 24, ans. 56, 57.
Goodwin, p. 74, ans. 22, 23.
Conant, p. 135, ans. 21 to 25.

14. Complainant put in as his evidence Demerritt's letter (Ex. 24), which asserts the truth of the answer.

Conant, p. 30, ans. 56; p. 86, ans. 45; Ex. 24, correcting Ex. 5; letter (Ex. 25).

15. It is true that John Demerritt, in his cross-examination and subsequent re-examination, gets into doubt and is uncertain about the time, then afterwards comes to the conclusion, and makes and adheres to the statement that according to his memory or *reasoning then*, this transaction about the $60 or $70 was prior to the sale, and in reference to a difference in the payment of interest April 1, 1867.

Page 93, ans. 84 to 102; p. 104, ans. 161 to 204; p. 109, ans. 214; p. 110, ans. 222 to 225; p. 111, ans. 230–235; p. 114, cross-ans. 116 to 122; p. 116, ans. 264 to 316; p. 120, ans. 329 to 382.

While he is sure that he had a statement, and held several interviews with complainant about a balance of $60 or $70 left due as a difference in the computation of interest, in which he promised to pay the same, and adheres positively and confidently to that fact, he is led into an unintentional error, only as to the time and occasion of the transaction.

It is to be observed that the witness had, previously to the time of giving his evidence, lost his office as director and president, and was not altogether friendly in feeling, at least towards some of the purchasers, who, as he supposed, would have to stand the loss if the respondent was defeated in this suit. (Page 111, ans. 237 to 252.) He was in a position tending to bias him, if at all, against the respondent, and the course of his examination and the manner of delivering his testimony shows only that he was not a willing witness in its behalf.

He was regarded and treated in the examination as an unwilling witness for the bank. The respondent's counsel, seeing that he had come apparently to a wrong conclusion solely as to the *time and occasion* of the transaction, brought the facts forcibly to his mind with

a view of exhibiting to him his error in this respect, not under the supposition or with the feeling that he was intentionally wrong. He is peculiar but not dishonest.

16. It is enough for respondent now to demonstrate on the evidence, as it is easy to do, that this matter of promise to pay the difference in interest was after and in view of the sale and did not relate to a prior balance.

Assuming that there was an amended account, made up by Mr. Conant upon his return Sept. 10, 1868, and given to the president for complainant, as is shown beyond a question or doubt, and that the president did have interviews with complainant at several times, wherein he promised to pay a balance of some $60 or $70, as is also clear, the question is whether the said $62.52, as by Exhibits 10 and 29, was not that balance, and not one arising out of prior payment of interest.

It appears that Demerritt's recollection, until within a short time before he testified, had always been as we claim, and he had repeatedly so stated on important occasions, when he stood in official relations and was called upon to act.

> Demerritt, p. 14, ans. 119; p. 49, ans. 49; p. 96, ans. 62 to 69, Ex. 24, 25; p. 123, ans. 377 to 382.

He had given the facts thus to the respondent's counsel, at the house of Mr. Robinson, in preparation for an answer to the bill, and such was his recollection then.

> Page 123, ans. 376 to 382.

He had so officially reported to Mr. Conant and the directors at the time of the occurrence.

> Ev. of *Conant*, p. 135, ans. 20 to 24; p. 34, ans. 18 to 21; p. 148, ans. 58, 9.
>
> Ev. of *Robinson*, p. 24, ans. 56 to 57.
>
> Ev. of *Goodwin*, pp. 74, 7, ans. 22, 23.
>
> *Demerritt* says he reported the truth at the time, p. 110, ans. 223 to 226; p. 108, ans. 148 to 202.

The answer, when drawn and read over to him, preparatory to being sworn to and filed, was sanctioned by him as true.

> Ev. of *Conant*, p. 135, ans. 26 to 29.
>
> Ev. of *Demerritt*, p. 95, ans. 47 to 52; p. 109, ans. 213 to 217.

On Sept. 11, 1872, when complainant's counsel wrote the demand of that date (Ex. 4), he replied officially to it in behalf of the bank, as appears in Ex. 24, re-asserting the truth of the answer, and that after receiving it with letter (Ex. 25).

Ev. of *Demerritt*, p. 96, ans. 62 to 70.

This original and earlier recollection as to the date and circumstances of the occurrence is more likely to be right than the later one.

He frankly says that he has not refreshed his recollection by reference to the books and papers (page 107, ans. 188; p, 116, ans. 264–6; p. 118, ans. 303, 304; p. 120, ans. 329 to 332); and that nothing in particular has served or can be shown to change his memory or fix the date (p. 118, ans. 305); only comes to the conclusion that it was "impossible" that it should have been after the sale, although he had always before so thought and stated, reaching the conclusion as a matter of *reasoning* rather than as a matter of *memory*.

Page 114, cross-ans. 119; p. 118, ans. 298 to 305.

Instead of its being "*impossible*" that it should have been after, it is demonstrable that the occurrence could not have been before the sale on Sept. 8, 1868.

a. The interest was paid satisfactorily to April 1, 1867.

b. The bill so alleges and the answer so admits.

Pages 1, 6.

c. It was paid at the time at seven per cent and not at six, so there was no difference to adjust afterwards. Mr. Conant so testifies, and proves it conclusively by the books, records, and papers, as well as by his recollection.

Ev. of *Conant*, p. 133, ans. 1 to 40; p. 147, ans. 44 to 49; p. 169, Ex. 29; p. 148, 149, ans. 58 to 70; p. 168, Ex. 26, 27; p. 150, ans. 71 to 83; p. 151, ans. 85 to 109; p. 153, ans. 110 to 145, Ex. 30.

The only fact tending to refute Conant's evidence that interest was paid at seven per cent April 1, 1867, is a difference of thirty-nine cents in the computation of interest as paid and credited at that time. It was, perhaps, a mistake in casting. At any rate, the discrepancy is too trivial for a serious argument.

Ev. of *Conant*, p. 133, ans. 2 to 16; p. 146, ans. 106.

The amount of interest then paid will not square with any other basis of computation.

If the error was a difference in interest, April 1, 1867, of between six and seven per cent, that difference would have been $119.61, and not $60 or $70; so the amount does not correspond.

Ev. of *Conant*, p. 146, ans. 106.
" *Demerritt*, p. 124, ans. 382.

d. The notes held show a full indorsement of the interest due on the same to April 1, 1867.

Ex. 26, 27, pp. 168, 169.

e. There is no pretence that there was any payment on principal or interest subsequent to April 1, 1867, and before date of the sale, Sept. 8, 1868, but the contrary thereof appears by the bill and otherwise in proof. (Page 136, ans. 31 to 33.) Interest was cast on the books from April 1, 1867, up to October 1, 1867, at the rate of seven per cent. The papers show the same.

Ev. of *Conant*, p. 153, ans. 108, 109; p. 153, 154, ans. 104, 105, 119 to 125.

f. Upon what, then, did the occasion arise?

It appears beyond dispute, as the witness was shown in the re-examination, that in the account of Sept. 8, 1868 (Ex. 21), the interest was cast at six per cent, not seven, — one error; that there had been a prior sale of some bonds under a power (Ex. 9), and a resultant balance of $375.03, which was not allowed in casting the interest in Ex. 21, but which appeared allowed on the books of the bank as interest paid, and had in fact been indorsed September 8, 1867, as interest on one of the notes (Ex. 27).

Ev. of *Conant*, p. 154, ans. 119.

g. Upon the discovery of these facts by the cashier, on his return to the bank, Sept. 10, 1868, and an examination of the transactions had in his absence, the time came and the occasion arose for honest business men to rectify the error.

If the interest had been computed right, there was $375.03 due and to be paid to Mr. Hayward, and his notes should be surrendered. If the interest was cast at seven per cent, as had been agreed, although the notes were written at six, there would be a balance of $62.52, which should be paid to the bank before the

notes were surrendered. This is the only time when any occasion arose for Demerritt to go to complainant to get a balance due, and which he would be liable or likely to pay. Mr. Conant, the cashier, whose duty embraced the transaction, swears most positively that there was prior no other time or occasion when such a difference of interest was cast up or called for.

Dep. of *Conant*, p. 136, ans. 29, 30, 31, 32.

h. The cashier swears to giving the statement, with the notes, to the president, and to complainant's subsequently telling him personally that he would pay the balance of $62.52.

Ev. of *Conant*, pp. 148, 149, ans. 58 to 69; p. 147, ans. 47 to 50.

i. Complainant told cashier after this that he was glad to be "relieved from under the harrow."

Page 28, ans. 29, 30; p. 148, ans. 48, 49.

j. The cashier was the only party to discover the error and deliver the amended account, and this with the knowledge of and the report to the directors, fixes the time and occasion, while it may not be competent evidence beyond that.

Ev. of *Robinson*, p. 80, ans. 4; pp. 24, 25, ans. 56, 57.
" *Goodwin*, p. 74, ans. 22, 23.

When all these facts were forcibly arrayed and brought to the attention of the witness, for the purpose of convincing him of his error then, and that he was mistaking the time and occasion, he, through some confusion of mind or defective reasoning faculties, failed to change his previously expressed opinion that it was "impossible." If it did not convince him of his error as to time and occasion, it must be apparent to the Court, and the fact stands proved that the promise of complainant referred to the said balance of $62.52.

It is not the first time that an honest witness, who is perfectly sure and correct about the main fact, has been mistaken about a matter of time and occasion.

He says that he recollected nearly the exact amount, and stated it when he was giving the facts to Mr. Robinson and counsel.

Ev. of *Demmeritt*, p. 123, ans. 377 to 379.

His changed recollection, if it may be called such, gets no aid from the testimony of complainant, for he pretends to recollect nothing about the bonds, nor of any balance arising from the sale of same, and denies that the president did call upon him for any balance at any time.

Page 57, ans. 133; p. 55, ans. 97, 103; p. 57, ans. 130.

Mr. Conant testifies that the notes were never retained except for the prior payment of said balance of $62.52.

Dep. of *Conant*, p. 149, ans. 70.

It is not just towards the witness to say that these contradictions of him *in a mere matter of time and of the occasion*, when the *main fact* is clearly remembered, and he is abundantly confirmed in it by all the other facts in evidence, serves to discredit him altogether.

17. The complainant's own testimony, on the other hand, is to the effect that he admits that the respondent had his two several written powers of attorney, authorizing it to sell; that he was still in default after the lapse of nearly two years, without having paid anything of principal or interest, save that the latter was paid to April 1, 1867; that he had been repeatedly urged in vain to pay; that he received notice of the vote of Aug. 17, 1868 (Ex. 20, p. 48, ans. 7 to 9), and was still unable to pay anything, and neglected and refused to comply; and that he subsequently, when the account (Ex. 21) was rendered to him, in which he was credited with cash to the amount of $39,257.16, knew and was informed that the stock had been sold (pp. 55, 56, ans. 103–115); but he denies that he consented to the sale, or had any other or further notice of the intended sale in advance, or had any knowledge, information or suspicion afterwards, that directors were the purchasers, until in the fall of 1871, when in a casual conversation with John Demerritt, the president, he was told of the fact (p. 49, ans. 23); or that he had any other account besides Ex. 21, rendered or shown to him, or that he promised to pay any balance of interest.

But his memory is shown in the cross-examination to be very poor, to say the least; and his conduct, upon his own pretence, appears to be very strange and improbable, and is alone consistent with the theory and evidence of respondent. For in-

stance (p. 53, ans. 57, 62), he says he does not recollect who handed him the notice of Aug. 18, 1868 (Ex. 20), or as to conversations with the president (ans. 61, 81), or with the cashier (p. 54, ans. 80, 87), or what he did or said when Ex. 21 was handed to him (p. 54, ans. 88, 91); will not swear that he did not have conversation with the president and cashier before and after the account (Ex. 21); does not recollect interview sworn to by Curtis (p. 127, ans. 5; p. 62, ans. 212 to 214); felt "too cast away" to speak to anybody (p. 55, ans. 105); saw he was credited with cash to balance his account (ans. 10, 8); made no inquiry as to where the money came from, felt so dull at the time, cared little about anything (ans. 111). But he finally was forced, after much reluctance, to confess that he knew and was told that the stock was sold, yet still pretends that he does not recollect what was said on the subject by the person who brought the account. (Pages 55, 56, ans. 112, 120.)

It was evident by the conduct of himself and his counsel, in questions and answers 11–13, p. 48, that they were trying to establish Ex. 6 as the account rendered, it being without any credit of the proceeds of the sale of stock, and that Ex. 21 finally came in with reluctance, after objections to the first inquiries (ans. 29). That he, when so largely interested, should not look at the account, or inquire as to who had purchased the stock, or to whom or for what it had been sold, or wonder and ascertain why any one was paying some $10 a share above the market price and taking such a great number of shares in one purchase; that he should not speak about it when he saw the officers of the bank, whom he knew well and met often, or take up his notes when the account appeared to be settled; that he should be a broker engaged in dealing in stocks (p. 86, ans. 134 to 141), and possibly selling Hecla stock, for nine months or more after that (p. 57, ans. 142-6), and watch and know of the sales in the market, the rise or depression of the stock (p. 60, ans. 192), and the union of the companies (p. 58, ans. 147 to 150), and all the time have no curiosity and feel no interest to ascertain about this sale (p. 58, ans. 151 to 189), I cannot well see or explain upon any reasonable theory of human conduct and on his hypothesis.

It is manifest that complainant had then every reason to feel happy and not "cast away," or as though his stock had been "sacri-

fied," as he now pretends (p. 56, ans. 118). It had been sold for nearly $10 a share above the market price, he relieved from debt and a bad speculation, while some two years more passed with a continued depression and bad prospects. The truth is, he felt satisfied and pleased with the result, and that he had been "relieved from under the harrow," as he told the cashier, according to his testimony. (Page 28, ans. 28.)

His *cheek*, as pretended in ans. 205, p. 61, is quite marked, after what had been done for him by the bank prior in the matter of this loan.

His evidence on these points cannot be accounted for consistently with the other admitted or proved facts in the case, unless we conclude that he has a poor and a weak memory, or that it is obscured and controlled by his stronger desire for the large amount of money at stake. He confesses to having been broken down, and to remaining in retirement after the summer of 1869, till late in 1871 (p. 57, ans. 141), and to a memory impaired by misfortune. (Page 62, ans. 221.)

18. We observe again: Demerritt stands firm on the main facts, and is amply corroborated otherwise, independently of Mr. Hayward. His appearance and conduct in the examination and cross-examination are manifestly not of a witness biassed in favor of the bank, but the contrary thereof.

In the direct and in the cross examination, he swears most positively and reiterates repeatedly that he got and reported the prior assent of complainant to the sale as made, naming the proposed purchasers, and his memory does not weaken or waver at all upon this point.

If he had been testifying as a willing witness, and under a bias for respondent, he would not have failed to see the demonstration forced home upon him as to what occurred in reference to the balance of $62.52 (p. 120, ans. 330 to 382), or so easily been led to conclude that the occurrence was prior to the sale, contrary to his own often expressed recollection before.

He could not fail to remember as to the first fact in a matter of such moment, and did not.

19. If, however, any doubt remains on either of these points, the answer under oath is sufficient to determine the question.

Under the decision of this Court, in *Carpenter* v. *Providence and W. Ins. Co.*, 4 *Howard*, 185, the answer is of such weight as evidence in chancery practice that it requires the evidence of more than one *disinterested* witness to overcome it. Such is the established rule of law. (*Voorhees* v. *Bonnestel*, 16 *Wallace*, 16.) It the sworn answer of the bank, although the oath is made through its authorized officer, the cashier.

The cashier was personally or officially cognizant of all the facts, and upon that knowledge made the oath, with the official concurrence of the other directors as well as the president.

Complainant is the only witness to sustain the averments of the bill on the controverted issue, and stands in opposition to every other witness examined by him and respondent, and every circumstance of the case shown. He is the party plaintiff, and is *largely interested*. In fact, on his testimony alone depends his title and right to recover the large amount of property in question. His evidence, therefore, is not enough to overcome the weight of the answer alone, as to facts distinctly averred in the bill and unequivocally denied in the same as is the case here; much less the answer and all the other evidence in support of the same.

20. The corrected account and the promise to pay the balance of $62.52, is only one element affecting the confirmation of the sale, and as affording an explanation of why the notes were not given up. If the sale was assented to in advance, that fact alone is enough to obviate all objections made to it, because of the relations of the buyers, and we need not spend so much time upon the point of subsequent account and promise to pay the balance, save to vindicate the answer.

II.

We proceed to other questions of law and fact, which arise in the various aspects of the case.

1. It is clear that the sale would be valid and binding on complainant, if he previously assented to it or subsequently sanc-

tioned the same, although made to three persons who were at the time directors.

2. It is also well settled by many well adjudged cases, both in England and in this country, and especially by this Court, that where the property is of a speculative character, and a party has the option either to disaffirm the sale, or rest upon and affirm it, he must exercise that option with the greatest diligence; is not permitted to lie by and await events, and if things take a favorable turn, disaffirm the sale, and if they take an unfavorable turn affirm it and stand upon it.

Kerr on Fraud, Accident and Mistake, p. 306.
Wade v. *Pettibone*, 11th Ohio, 57.
Follansbee v. *Kilbreth*, 17th Ill. 522.
Scott v. *Freeland*, 7 Smedes & Mar. (Miss.) 409.
Lawrence Case L. R., 2 Chancery Appeals, 425.
Banks v. *Judah*, 8 Conn. p. 145.
Rogers v. *Saunders*, 18 Me. 94.
Twin-Lick Oil Co. v. *Marbury*, 1 Otto, 587, and cases cited there.

3. It is also the law, as respondent respectfully submits, that the complainant, before he can go into the evidence and claim a constructive fraud, should state such a case in his bill.

Vorhees v. *Bonesteel*, 16 Wallace, 16.

The transfer made by the complainant in October 1866, passed the legal title to the stock, and under the authority of *Holmes* v. *Crane*, 2 Pick. 607, operated as a mortgage. The bank had complete power in writing to sell and transfer the stock and give a perfect title.

In the bill there is no suggestion of these powers of attorney; still less does it go so far as to put the matter directly in issue, whether the conduct of the bank under those powers of sale was such as to amount to a constructive fraud, giving complainant the alternative either of affirming or disaffirming. The case relied upon is not even hinted at in the bill.

The purchasers and persons said to hold the stock under the authority of the bank, and who on the evidence of the complainant did in fact buy the old stock, and take and hold the new which was

taken for it in the consolidation, together with the dividends declared and paid, and who still claim and hold the same adversely to the bank, are not joined and brought before the Court, so that the prayer of the bill, if granted, could be made effectual and secure a transfer of the stock.

4. The bill should have alleged a sufficient excuse for the long delay occurring between the sale on Sept. 8, 1868, and the eleventh and fourteenth days of March, 1872, when the offer to redeem was made and the bill filed.

Harwood v. *The Air Line Railroad*, 17 Wall. 78.

At least such an excuse should be shown in the proofs. But this is neither alleged in the bill nor shown in evidence.

Even if it does not satisfactorily appear (as we think it does) that complainant acquiesced, with full knowledge of the facts, in what he now contends was irregular and inequitable, he admits that he had knowledge of the terms of the sale; how much the property produced; that he had a regular account rendered him, which showed, and from which with other information he knew, that a sale had been made, producing an amount exceeding by about $10 a share the market price of the stock, and indicating *that the sale was made out of the market as a special and peculiar one*, and not in the ordinary course of business.

He pretends that he felt that the stock had been sacrificed, and that he was dissatisfied, or "cast away," as he expresses himself. And yet he rests with apparent unconcern, and three years and seven months are allowed to pass away without an expression of dissatisfaction, or an act of inquiry or a word of objection. He does not allege, on his theory, when he acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained, and for aught that appears in the bill and by his own evidence, he slept upon his rights for said period of some three and a half years.

Indeed, he says that he felt so dull at the time that he made no further inquiry, cared little about anything,—whither the stock went, or about anything. (Page 55, ans. 111.) It was not illness nor absence, but total indifference, as he puts it, while the law required vigilance and action.

It appears further by the evidence of the complainant himself, if

believed, that the president of the bank *in the autumn of* 1871 (say September, the bill having been filed March 14, 1872) told him that directors had bought the stock (p. 49, ans. 23); and he slept on still, for several months more.

He does not, in his evidence, show why he did not ascertain it earlier. He could have ascertained the names of the purchasers, if he did not already know them, by slipping into the office of the Mining Company, in Boston, where he and it lived and did business, or by inquiry of the officers of the bank, with whom he was acquainted and whom he met frequently afterwards (p. 62, ans. 182, 183), there being no pretence of any secrecy or fraud practised by any party, but the whole thing appearing above-board, with a full belief on the part of the bank officers and the buyers that he knew all about it.

He remained in business as a broker on the street for some nine months afterwards, dealing in this or other stock. (Page 51, ans. 141.)

He lived in Boston all the time, and returned to the street again in 1871, meeting the president in the fall of that year.

The stock had been fluctuating in the market meanwhile, had gone up in price on Oct. 20, 1870, and thereafter was selling in the market for much more than enough to meet his debt if still existing, and in May, 1871, the union of the companies occurred, and before and afterwards the stock was paying dividends, and was selling for enough, during part of the time, to leave a considerable margin. He was aware of this and kept the run of the market, as he admits substantially, and yet he did not move until the stock had gone up again to $150 a share, and it had become a decided advantage to get it.

Ev. of *Martin*, p. 64, ans. 4, 5.

Ev. of *Complainant*, p. 58, ans. 145, 146; p. 58, ans. 159.

It was his duty if dissatisfied, as he says he was, and upon what he admits of knowledge, to inquire and learn about the transaction, and he had the means of obtaining full knowledge upon simple inquiry if he did not have it already. Instead of doing this he sleeps upon his rights, says he "took some interest, but made no inquiry." (Page 59, ans. 168.) Learned of the sale, "did nothing at all, only regretted it." (Page 59, ans. 169.) Never looked to see what price it brought. (Ans. 173.) Did not take interest enough to

inquire who the purchasers were. (Ans. 175 to 181.) Never alluded to the subject again, until the fall of 1871.

In law, and especially in equity, a man is held by construction to know what he had the means of knowing, and was bound in fairness to have ascertained.

In the autumn of 1871, when upon his own evidence he had actual notice and knowledge that directors were the buyers of the stock, the price was down again to from $89 to $110 a share, and widely fluctuating, and March 11, 1872, when he first acted it had gone up again to from $128 to $150 a share. (Page 64.)

In the case cited in 17th of Wallace, the Court lay great stress upon the facts that the complainant knew of the mortgage sale at the time when it took place; that he might have ascertained, if he had made inquiry, who had purchased; and they held that the fact that he abstained from inquiry, and merely alleged in the bill his ignorance, was not sufficient. Now here he does not even allege his ignorance. Instead of saying that this was secret, or that there was any misleading or fraud, and going on to show when and how he discovered it, and why he did not discover it before, there is not one word about it. And in the proof, he appears, on his own evidence, to have known the fact of a sale having taken place, the price got, with a credit of the proceeds in cancellation of his debt, to have believed that his stock was sacrificed, and to have had at hand the means of ascertaining the full facts upon simple inquiry, and he chose to sleep upon his rights, for three and a half years; and then when he did learn the fact entitling him to disaffirm the sale, on his theory, he slept on from that time (in the fall of 1871) till March 11, 1872.

This was clearly without sufficient excuse on his theory, and operated as an acquiescence in, and a confirmation of, the sale.

Even the delay which occurred after the conversation with the president in the fall of 1871, calling it only four months, was an unreasonable one, certainly, in view of the lapse of so long a time previously since the sale, and the fluctuating nature and actual charge in the market value of the stock which occurred afterwards.

The delay not only tended, but did actually operate, to the prejudice of the bank, if redemption was then allowable.

At any time within about two years after the sale, the stock was worth in the market and could have been had for about and even less than what it was sold for by the bank.

If entitled to redeem in the fall of 1871, it was about $50 a share less than what it was March, 1872, when the bill was brought.

The conclusion of the whole matter is, both as regards the sufficiency of the bill and the question of fact independently of the pleadings, that the complainant was without excuse for his delay, and that he was too late in his attempt to disaffirm on his own story, and did in fact affirm the sale, and preclude himself thereby from any right to redeem afterwards.

III.

We have taken no notice of some evidence sought, or obtained, tending to show that when the stock was finally sold, the president promised to take it back at the end of six months. It was attempted in this way to be shown that the sale was colorable, or pretended, as averred in the bill. But the attempt wholly failed. The most that can be made out of it comes from the evidence of the president, and that was that when the proposed purchasers found that the price was coming too high, they hesitated about taking it, and did not do so until the president urged it, and said something about his taking it back at the end of six months, if they desired it.

John Demerritt, p. 89, ans. 43–49; p. 91, ans. 64–68.

The purchasers state their recollection of what was said, and show that it was nothing more than mere traders' talk, in order to effect the sale.

Conant, p. 149, ans. 69, 70.
Robinson, p. 80, ans. 3.
White, p. 129, ans. 3 to 8.
Goodwin, p. 78, ans. 33, 34.

What was said in this respect operated at the time for complainant's benefit, in inducing a sale for a price so much above the market price. Was no binding bargain.

IV.

I do not propose to discuss at length the question of constructive fraud, in that the sale was made to three persons who were at the time directors. No alleged actual fraud receives any support from the evidence.

The facts take the case out of the rule anyway, if complainant assented to the sale, as is proved he did.

I take it to be law that a director may deal with the bank as an individual, and make contracts, if it is done fairly and in good faith.

Had the purchasers been the bank itself, or a majority of the directors, so that parties acted both as buyer and seller, and the complainant had not assented to or ratified the sale, the case might stand differently, and come within principles covered by adjudged cases.

Michaud v. *Giroud*, 4 How. 503.
Gillett v. *Peppercorne*, 3 Beavan, 78.
York and Midland R. R. Co. v. *Hudson*, 16 Beavan, 485.
Bentley v. *Craven*, 18 Beavan, 75.
Kimber v. *Barber*, *L. R.* 8 Ch. 56.
Francis E. Parker et al. v. *Nickerson*, 112 Mass. 195.

It is a sound rule of law as stated in last case: "A trustee or agent cannot purchase on his own account what he sells on account of another, nor unite in himself the opposite characters of buyer and seller; and if he does so, the *cestui que trust*, or principal, unless upon knowledge of the facts he elects to confirm the act of the trustee or agent, may repudiate it or he may charge the profits made by the trustee or agent with an implied trust for his benefit."

In that case, the directors who acted, and whose action was the subject of complaint, were a majority of the board, and held and owned the other two as their instruments or tools. Not so here. The president represented the bank under ample authority, and the purchasers did not act in both capacities in the sale made.

An officer of the bank can act as an individual and deal in that capacity in contracting with the corporation as the other contracting party.

Cumberland Coal Co. v. *Sherman*, 30 Barb. 50.
Beeson v. *Beeson*, 9 Penn. St. 280.

Undoubtedly transactions of the kind are to be scrutinized closely, and perfect fairness and good faith required by the Courts before sanctioning them. There is ample proof of such here.

The sale being made under the vote of Aug. 17, 1868, duly passed, it is immaterial whether in the subsequent meeting of Sept. 7, 1868, there was or was not a quorum, exclusive of the purchasers, when the sale was approved. Such action was unnecessary under the prior vote in force, while it was perfectly proper to get the sanction of the other directors as a matter of fairness towards them, or as extra caution.

The sale was for a full price and more, and the subsequent higher value came from future action, combination of companies, and favorable legislation, so that complainant was not injured or prejudiced by the sale, but relieved by the large price obtained above what it was worth. He had no ability, means or disposition to carry the stock for the two requisite years to make it available.

So we submit here that the sale made was effected in perfect good faith, and that the same is free from actual or even constructive fraud.

But if, in any event, the Court hold against us, we submit that where trust property has been sold by a trustee in breach of trust, but without fraudulent intent, and the purchaser is not before the Court, the trustee is accountable only for the value of the property at the time of the sale with interest.

Ames v. *Downing*, 1 Brad. 305.
Heth v. *Rich. R. R.*, 4 Grat. 482.
Norman v. *Cunningham*, 5 Grat. 64.
Flagg v. *Mann*, 2 Sum. 566.

A fortiori, this should be the rule where the sale itself was expressly authorized by the mortgagor, was notified to him and not objected to, and when the only complaint is that persons having, or supposed to have, a fiduciary relation to the subject, were the actual purchasers.

A. A. RANNEY, *Counsel for Respondent.*

SUPPLEMENTARY BRIEF.

1. The objection to the answer and the oath comes too late.

The oath, not being waived, one was required.

The answer was accepted, as duly signed and sworn to, and with a proper *jurat*. No exception was taken to it, and a general replication filed.

The evidence was taken under the sixty-seventh rule, the case set down and heard, argued, and determined without any such objection or point being taken.

It is now raised for the first time.

This was clearly a waiver, and the answer should be treated as duly signed and sworn to.

Cushing *v.* Townshend, 19 Ves. 628.
Clements *v.* Moore, 6 Wall., 299.
Fritz *v.* Stover, 22 Wall., 198.

2. Since the rule of court was established providing before whom the oath to the answer *may* be taken, the acts of Congress of September, 16, 1850, (9 Stat. at Large, 458,) and of July 29, 1854, (10 Stat. at Large, 315,) have been passed, and were in force May 27, 1872, when the oath here was administered.

The second section gives ~~the~~ notaries public the authority to take depositions and do such other acts in relation to evidence to be used in the Courts of the United States in the manner and with the same effect as United States Commissioners.

3. The seal of the bank, if it had any, was unnecessary; or if necessary objection cannot be taken here for the first time. Does not appear that it had one.